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By A. C. FREEMAN.

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OHIO. — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**; (54 Ohio St.) **56**; (55, 56 Ohio St.) **60**; (57 Ohio St.) **63**; (58 Ohio St.) **65**; (59 Ohio St.) **69**; (60 Ohio St.) **71**; (61 Ohio St.) **76**; (62 Ohio St.) **78**; (63 Ohio St.) **81**; (64 Ohio St.) **83**; (65 Ohio St.) **87**; (66 Ohio St.) **90**.

OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**; (40) **91**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176 Pa. St.) **53**; (177 Pa. St.) **55**; (178 Pa. St.) **56**; (179, 180 Pa. St.) **57**; (181 Pa. St.) **59**; (182 Pa. St.) **61**; (183, 184 Pa. St.) **63**; (185 Pa. St.) **64**; (186 Pa. St.) **65**; (187 Pa. St.) **67**; (188 Pa. St.) **68**; (189 Pa. St.) **69**; (190 Pa. St.) **70**; (191 Pa. St.) **71**; (192 Pa. St.) **73**; (193 Pa. St.) **74**; (194 Pa. St.) **75**; (195 Pa. St.) **78**; (196 Pa. St.) **79**; (197 Pa. St.) **80**; (198 Pa. St.) **82**; (199 Pa. St.) **85**; (195, 200 Pa. St.) **86**; (201 Pa. St.) **88**; (202 Pa. St.) **90**.

- RHODE ISLAND.** — (15) **2**; (16) **27**; (17) **33**; (18) **49**; (19) **61**; (20) **78**; (21) **79**; (22) **84**; (23) **91**.
- SOUTH CAROLINA.** — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**; (45) **55**; (46) **57**; (47) **58**; (48) **59**; (49) **61**; (50) **62**; (51) **64**; (52) **68**; (53) **69**; (54) **71**; (55) **74**; (56, 57) **78**; (58) **79**; (59) **82**; (60, 61) **85**; (62) **89**; (63) **90**; (64) **92**.
- SOUTH DAKOTA.** — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**; (6) **55**; (7) **58**; (8) **59**; (9) **62**; (10) **66**; (11) **74**; (12) **76**; (13) **79**; (14) **86**; (15) **91**.
- TENNESSEE.** — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**; (105) **80**; (106) **82**; (107) **89**; (108) **91**.
- TEXAS.** — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**; (94) **86**.
- UTAH.** — (13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**; (21) **81**; (22) **83**; (23) **90**; (24) **91**.
- VERMONT.** — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**; (72) **82**; (73) **87**.
- VIRGINIA.** — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**; (98) **81**; (99) **86**.
- WASHINGTON.** — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**; (23) **83**; (24) **85**; (25) **87**; (26) **90**; (27) **91**; (28, 29) **92**.
- WEST VIRGINIA.** — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**; (47) **81**; (48) **86**; (49) **87**; (50) **88**; (51) **90**.
- WISCONSIN.** — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**; (106) **80**; (107, 108) **81**; (109) **83**; (110) **84**; (111) **87**; (112) **88**; (113) **90**; (114) **91**.
- WYOMING.** — (3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**; (8) **80**; (9) **87**.

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AMERICAN STATE REPORTS.
VOLUME 92.

(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

FERGUSON v. STATE.

[134 Ala. 63, 32 South. 760.]

CRIMINAL TRIALS — Identity of Accused. — If an accused is indicted as "Buck Ferguson, alias Buck Ferguson," and his appearance bond bears the signature of "W. B. Ferguson," while in the order setting the day for trial the case is styled as "The State v. W. B. Ferguson," and contains a recital to the effect that "the defendant, W. B. Ferguson, alias Buck Ferguson," was then present in open court, this sufficiently shows that the accused named in the indictment was in court when his case was set for trial. (p. 18.)

CRIMINAL LAW — Accessories — Proof of Guilt of. — The guilt of a person accused of a felony may be established by proof that he contributed to the criminal result by words or acts intended and calculated to incite or encourage its accomplishment, whether he was present at its consummation or not. It is not essential to the incrimination of one so participating in a criminal act that it be done in respect to time, place or mode according to any prearranged or instigated plan. (p. 19.)

CONSPIRACY may be Established by Evidence Wholly Circumstantial and without proof of an express agreement between the conspirators. (p. 20.)

CRIMINAL LAW — Evidence — Subsequent Happenings. — The accomplishment of the object of a conspiracy necessarily ends the conspiracy, and subsequent happenings are not evidential of a past conspiracy unless they are such as, under all of the circumstances, may afford ground for inference that such conspiracy had existed. (p. 20.)

CRIMINAL LAW — Res Gestae. — An accused is not entitled to exculpate himself by bringing evidence of his own acts and declarations, when not a part of the res gestae, or of some transaction or conversation partially developed by the prosecution. (p. 21.)

CRIMINAL LAW — Opinions—Evidence.—In criminal cases, questions calling merely for the opinion of the witness are inadmissible. (p. 21.)

HOMICIDE—Evidence.—In a murder case, an inquiry as to whether the father of the deceased was sober on the occasion of a quarrel between him and the accused, some days before the killing, and whether, immediately thereafter a brother of the deceased came with a gun toward defendant's store, involves no part of the *res gestae*, and is therefore inadmissible. (p. 21.)

EVIDENCE—Conclusion of Law and Fact.—A question which embodies an improper invitation to the witness to state a conclusion involving both law and fact is properly rejected. (p. 21.)

CONSPIRACY—Evidence.—Proof of an agreement, understanding, or design to actually kill the deceased is not necessary to connect the accused with the crime as a conspirator, because if he was a party to a conspiracy to merely shoot and maim the deceased without killing him, and his death followed as the direct, proximate and natural result of a shooting in the accomplishment of such conspiracy, the responsibility of the accused extends to the consequences, though not intended by him, and renders him liable to a conviction of manslaughter in the first degree at least. (p. 21.)

J. A. Embry and Smith & Herring, for the appellant.

C. H. Brown, attorney general, for the state.

67 SHARPE, J. It is questioned whether this record contains the necessary affirmative showing that defendant was in court when his trial day was appointed. He was indicted as Buck Ferguson, alias Buck Ferguson. His appearance bond bears the signature of W. B. Ferguson. In the order setting the day for trial the case is styled as *The State v. W. B. Ferguson*, and contains a recital to effect that "the defendant W. B. Ferguson, alias Buck Ferguson," was then present in open court. Entire accuracy respecting the designation of defendant would have required strict conformation in this record entry to the indictment, instead of to the indictment in part and the bond in part; but the preservation therein of one of the names by which the defendant was prosecuted is sufficient to at least *prima facie* identify him as the person referred to as being present. The word "alias" is used in the indictment as the equivalent of *alias dictus* or otherwise called, and indicates that the person referred to bears both names laid under the alias, but that he is called by one or the other of those names: *Evans v. State*, 62 Ala. 6.

In *Hughes v. State*, 1 Ala. 655, cited for defendant, it was considered that in a capital case pleas should be entered so as to form an issue before the jury was sworn to try and render a verdict upon the issue joined. That this was done in the present case the record discloses plainly. The law did not require an arraignment or the interposition of a plea before the special jurors were drawn.

Under our statute (Code, sec. 4308) which abolishes the common-law distinction between accessories before the fact, and punishes and makes guilty as principals "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present," the guilt of an accused of a felony may be established ⁶⁸ by proof that he contributed to the criminal result by words or acts intended to and calculated to incite or encourage its accomplishment, whether he was present at its consummation or not: *State v. Tally*, 102 Ala. 25, 15 South. 122; *Raiford v. State*, 59 Ala. 106; *Hughes v. State*, 75 Ala. 31; *Brunson v. State*, 124 Ala. 37, 27 South. 410; *Griffith v. State*, 90 Ala. 583, 8 South. 812. It is not essential to the incrimination of one so participating in a criminal act that it be done in respect of time, place, or mode, according to any prearranged or instigated plan: *Griffith v. State*, 90 Ala. 583, 8 South. 812.

The shot which produced the homicide in question was fired by defendant's son, John Ferguson, while the defendant was from about one hundred and thirty to two hundred yards away, and the theory of the prosecution was that the firing was in execution of a conspiracy between him and the son, or that he was an aider or abettor in the crime. There was evidence tending to prove animosity as between the deceased Andrews and his father and brother on the one part, and defendant and his son on the other part. A witness testified that about a week before the killing defendant said to him: "I am under bond as postmaster, and do not intend to be run out of the office. If we were to kill the Andrews it would not amount to anything more than the shooting of a dog; that the grand jury would pay no attention to it." This witness further testified that on the same occasion defendant asked if he had seen the deceased, and said: "We are looking for him down here, and want to be ready for him when he comes." From another witness there was testimony to the effect that about four days before the killing, defendant said to him he "did not believe if John were to shoot one of the Andrews down, any more attention would be paid to it than the shooting of a dog. That the law would pay no attention to it, and that if he did get into it and kill one of them, he (defendant) had three hundred acres of land to spend getting him out of it." There was evidence tending to show further that just before he was killed, deceased passed along a road by defendant's store, that some one called John Ferguson's attention to his approach, whereupon John left ⁶⁹ the store

with a gun and went to defendant's stable lot which was by the road the deceased was traveling and between one and two hundred yards from the store; that after the deceased passed the store, defendant closed the store, and armed with a pistol followed in the same direction, and had gone about forty or fifty yards when John, firing from the stable lot, killed the deceased. When this was done, by reason of an elevation in the road, John and the deceased were not in view of defendant, but he proceeded in the direction of the firing to near the place where the deceased lay dead. There was other evidence, and some of it was in conflict with part of what we have stated; but the foregoing is sufficient to indicate that the question of whether defendant effectively conspired with, counseled or encouraged the slayer to the commission of the crime belonged exclusively with the jury. A conspiracy may be established by evidence wholly circumstantial and without proof of an express agreement between the conspirators: *Tanner v. State*, 92 Ala. 1, 9 South. 613; 3 *Greenleaf on Evidence*, sec. 93.

But the accomplishment of the object of a conspiracy necessarily ends the conspiracy itself, so far as it involves that accomplishment. Subsequent happenings are not evidential of a past conspiracy unless they are such as, under all the circumstances, may afford ground for inference that such conspiracy had existed. We think the trial court should have sustained the objections to the several parts of the testimony which collectively were to effect that after the shooting, and on the same afternoon, defendant left by the back way the store to which he and John had separately returned, and went toward the woods to which John had preceded him, and saw John between sundown and dark and returned late in the afternoon to the store, and that about three weeks afterward John came to the defendant's house after dark, spent the night there, and left before daylight.

The same natural impulses which the statute recognizes in exempting parents of an offender from punishment for aiding in his escape (Code, sec. 1309) serves to account for defendant's association with his son ⁷⁰ after the killing, clandestine though it may have been and intended to accomplish his son's concealment or escape. Neither in itself or in connection with any evidence in this record can such testimony be considered as affording any just inference that defendant was criminally connected with the homicide. The errors of its admission were probably prejudicial to defendant, and must work a reversal of the judgment.

A defendant is not entitled to exculpate himself by bringing evidence of his own acts and declarations when not a part of the *res gestae*, or of some transaction or conversation partially developed by the state: *Roberts v. State*, 68 Ala. 516; *Billinglea v. State*, 68 Ala. 486; *Stewart v. State*, 63 Ala. 199. This principle applies to the inquiries proposed by defendant as to whether shortly before the killing he requested Phillips "to talk to his son and the Andrews, and to get them to drop the trouble between them," and of whether on the night after the killing defendant visited the home of the mother of the deceased.

The inquiry of Phillips, "if in his judgment the defendant could have seen Will Andrews or anyone else coming along the road before he reached the store as it led by the defendant's store from the position occupied by the defendant at the time," called merely for the expression of opinion by the witness and was therefore objectionable.

Whether the father of the deceased was sober on an occasion of a quarrel between him and defendant some days before the shooting, and whether immediately after the shooting one of the Andrews boys came with a gun from toward defendant's store were irrelevant inquiries, calling for no part of the *res gestae*.

The question addressed to defendant by his counsel, "Were you or not in any way knowing to the purpose of John to kill Will Andrews before he had killed him or were you in any way connected with the killing?" embodied an improper invitation to the defendant to state a conclusion involving both law and fact, viz., whether what he did was sufficient to fix his status as a conspirator and so connect him with the killing.

⁷¹ The charges refused to defendant each assumed that proof of an agreement, understanding or design to actually kill the deceased was necessary to connect the defendant with the crime as a conspirator, whereas if he was a party to a conspiracy to merely shoot and maim the deceased without killing him, and the death followed as the direct proximate and natural result of a shooting furthered by his conspiring, his responsibility extended to the consequences, though not intended by him and rendered him liable to a conviction such as was had of manslaughter in the first degree, if not for a higher offense: *Evans v. State*, 109 Ala. 11, 19 South. 535; *Tanner v. State*, 92 Ala. 1, 9 South. 613; *Turner v. State*, 97 Ala. 57, 12 South. 54; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91, 8 South. 23.

Reversed and remanded.

Conspiracy.—The presence necessary to constitute one a principal in the commission of a felony may be constructive. In establishing conspiracies, direct evidence is not essential; they may, and generally must, be proved by a number of indirect circumstances which vary according to the objects to be accomplished. Acts and declarations subsequent to the accomplishment or abandonment of the common design ordinarily are not admissible: See the monographic note to *Spies v. People*, 3 Am. St. Rep. 477, 482, 487.

Witnesses, either in civil or criminal cases, must generally state facts, and not give their opinions: *State v. Green*, 40 S. C. 328, 42 Am. St. Rep. 872, 18 S. E. 933; *Hodge v. State*, 97 Ala. 37, 38 Am. St. Rep. 145, 12 South. 164; *Melsaac v. Northampton etc. Co.*, 172 Mass. 89, 70 Am. St. Rep. 244, 51 N. E. 524.

STATE v. BLEVINS.

[134 Ala. 213, 32 South. 637.]

CRIMINAL LAW—Former Jeopardy.—If the trial of the accused for a misdemeanor, upon issue joined on plea of not guilty, proceeds to the conclusion of the evidence and reaches the stage calling for a judgment of the court on the issue as made, he is placed in jeopardy, and the court has no jurisdiction to bind him over to a higher tribunal to answer for a greater offense for the same act. (p. 24.)

L. B. Sheldon, for the petitioner.

C. G. Brown, attorney general, for the state.

214 DOWDELL, J. This appeal is prosecuted by the state from an order of the judge of the city court of Mobile discharging the petitioner on habeas corpus.

The prisoner was arrested on a warrant issued by the judge of the inferior criminal court of Mobile county, on an affidavit made by one Mary Junius, charging the defendant with an assault and battery on the affiant. The warrant was made returnable before the judge of said inferior criminal court. A day was set for the trial, and at which time the trial was entered upon, the defendant interposing the plea of not guilty. After the introduction of evidence by the state and defense, and upon the conclusion of the argument of counsel, the judge of the inferior court made and entered upon the docket the following order: "*State v. Willis Blevins. Assault and Battery. On hearing the evidence in this case it appears to the court that the offense of an assault with intent to ravish has been committed, and that there is probable cause to believe that the defendant is*

guilty thereof, wherefore it is ²¹⁵ ordered and adjudged that unless the defendant enter into a bond in the sum of five hundred dollars with good and sufficient surety for his appearance to answer said charge at the next term of the city court of Mobile, Alabama, and from term to term thereafter until legally discharged, he be detained in the Mobile county jail until legally discharged. April 26th, 1902."

Pursuant to this order a mittimus in due form was issued committing the defendant to jail, and under and by virtue of which he is now held in custody.

It is conceded that but one assault was committed, and that the assault and battery for which he was arrested and tried on the affidavit and warrant, and the assault with intent to ravish, for which he was committed, was the same offense. It is also admitted that there was no fraud or collusion in the suing out of the affidavit and warrant of arrest for the assault and battery. The case presented is whether or not the defendant was put in jeopardy in the proceeding against him for an assault and battery.

That the inferior criminal court of Mobile county has final jurisdiction in cases of assault and battery is not questioned. This court, under the act amendatory of the act of its creation, is given final jurisdiction of all misdemeanors concurrent with that of the city court of Mobile: Acts 1900-01, p. 2575. In the trial of misdemeanors before the judge of the inferior criminal court, the proceedings are commenced on affidavit and warrant as in the county court, under the provisions of chapter 142 of the Criminal Code. The proceeding against the defendant for an assault and battery was commenced under the provisions of this chapter. The affidavit upon which the warrant of arrest issued was the complaint, and on this complaint the judge of the inferior court had jurisdiction to try the case and render final judgment.

The felonious assault for which the defendant was bound over embraced the minor offense of assault and battery for which he was arrested and put on trial. If the defendant had been convicted for the assault and battery it would not for a moment be contended that ²¹⁶ he could again be tried and punished for the assault with intent to ravish. To do so would be in violation of an organic law, that no person shall for the same offense be twice put in jeopardy of life or limb. While cases are to be found in other jurisdictions which hold that on an acquittal or conviction for a minor offense, and the defendant is after-

ward put on trial for the greater offense, which embraced the former, no jeopardy arises, this court is thoroughly committed to the contrary doctrine. The state cannot elect to prosecute and try a person for a lower grade and then put him on trial for a higher grade of the same offense: *Moore v. State*, 71 Ala. 307; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 South. 632; *Storrs v. State*, 129 Ala. 101, 29 South. 778.

At what stage in the particular case jeopardy arises has in some instances been of serious and doubtful question, but there exists no room for doubt or question in the present case. The trial of the defendant here, upon issue joined on the plea of not guilty, before a tribunal of competent and final jurisdiction, had proceeded to the conclusion of the evidence, and reached the stage calling for a judgment of the court on the issue as made. There can be no doubt that the defendant was thus placed in jeopardy, and it follows that the order of the judge of the city court of Mobile appealed from discharging the prisoner must be affirmed.

Former Jeopardy.—In *Bell v. State*, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294, it is held that when a person is put on trial for an assault and battery in a court which has no power to stop the trial and bind him over for a higher offense, if the evidence justifies it, and a jury is impaneled and sworn to try the case, he is in legal jeopardy, and may avail himself of this defense in a subsequent prosecution for assault with intent to commit rape founded upon the same act. And in *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642, it is held that when a defendant is tried upon a charge of petit larceny, and upon the conclusion of the evidence, the court, believing that another crime has been committed refuses to render judgment, and dismisses the charge of its own motion, the defendant has been placed in jeopardy, and the proceedings are a bar to a subsequent prosecution for grand larceny upon the same facts: See, further, the monographic note to *People v. McDaniels*, post, pp. 89-159.

KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY v. FOSTER.

[134 Ala. 244, 32 South. 773.]

NEGLIGENCE — Proximate Cause.— A person guilty of negligence is liable for all the consequences which a prudent and experienced man, fully acquainted with all of the existing circumstances, would, at the time of the negligent act, have thought reasonably possible to follow if they had occurred to his mind. Hence, if the wrong committed and the alleged damage are known by common experience to be naturally and usually in sequence, the wrong is the proximate cause of the damage. (pp. 26, 27.)

RAILROADS — Liability of Connecting Carriers.— If a passenger has received from the initial carrier a number of coupon tickets, one for his passage over the road of the first carrier, and the others as passports over the lines of succeeding and connecting carriers, the first carrier or its agent selling such tickets is the agent for the connecting carrier, and the latter is liable for negligent injury to such passenger while traveling upon its line. (p. 27.)

RAILROADS — Wrongful Ejection of Passenger.— If, by mistake of an officer or agent of a railroad company a passenger is not furnished with a proper ticket evidencing his right to be carried to his destination, for which he has paid, his right still remains, and if, for want of the requisite evidence of such right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and the passenger has a complete right of action for all damages resulting from such breach. (p. 29.)

RAILROADS — Wrongful Ejection of Passenger — Measure of Damages.— The measure of damages to a railroad passenger who, buying a ticket to one place, is given a ticket to a less distant place, where he is ejected, is not confined to the mere cost of transportation from the point of ejection to the point of destination to which he has paid. His damages may also include compensation for indignities placed upon him, as well as for the pain and suffering of both body and mind resulting from the wrongful act. (p. 30.)

APPELLATE PRACTICE.—The overruling of a demurrer to a count in contract, on the ground that it was joined with a count in tort cannot be reviewed on appeal if the count in tort has been withdrawn during the trial, or the court has charged that there could be no recovery thereon. (p. 30.)

Walker, Tillman, Campbell & Porter, for the appellant.

H. A. Jones, R. Brown, and H. B. Foster, for the respondent.

253 HARALSON, J. The complaint contained six counts. The one numbered 1 and 5 were withdrawn and abandoned by plaintiff, and the court instructed the jury, at the instance of defendant, that they could not find for the plaintiff under the

first, fourth and sixth counts. We need not, therefore, consider any of the rulings of the court on motions to strike certain parts of these counts, and on the demurrers interposed to them. There was left alone in the complaint the third count, on which, after rulings on motions to strike certain parts thereof had been overruled and others sustained, issue was taken and the cause tried.

1. The portions of said count which the defendant moved to strike and which were overruled were: 1. "And the plaintiff avers that it was with the greatest difficulty and after much trouble, delay, opposition, alarm and mortification to himself that he obtained leave to pass the night at Byhalia, and he was forced and required to leave the town the next morning"; 2. "And plaintiff avers, that when he was put off, it was during the time and when the yellow fever was prevailing in many parts of the country, including that in which Byhalia is situated, and the town of Byhalia was quarantined against all other places"; 3. "And plaintiff further avers that by and from being wrongfully put off of defendant's said train, as aforesaid, he suffered great fear and uneasiness because of the supposed prevalence of yellow fever in that locality, and his exposure to it."

The count contained the averment that the defendant's agent at Waco, Texas, sold him his ticket, and when he sold it to him, said agent knew that the yellow fever was prevailing, and knew of the danger and inconvenience of making his way through the state of Mississippi, through which defendant's said road passed; that plaintiff had not with him at that time sufficient funds with which to purchase a ticket, or pay the railroad fare from Byhalia to Birmingham, and defendant's agent who was in charge of said train knew this fact when he put plaintiff off of said train.

It is sometimes difficult to determine what, in law, ²⁵⁴ is and what is not proximate cause of injury. In *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 223, 26 South. 349, the rule was stated to be "that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind": *Louisville etc. R. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Western Ry. Co. v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894. Here, the wrong com-

mitted by the agent at Waco and the alleged damage are known by common experience to be naturally and usually in sequence, and we are impressed that the court committed no error in overruling the motion to strike the parts of the complaint objected to.

2. There are a great many errors assigned, but appellant's counsel very correctly state in brief they each substantially raise one or the other of two propositions, that the appellant is not liable to appellee for the mistake of the St. Louis and Southwestern Railway Company's agent at Waco, Texas, or, if it should be held that appellant is liable for the mistake of such agent, appellee's recovery in this action must be limited to the cost of transportation between Byhalia and Birmingham.

The first inquiry is, Was the ticket agent at Waco, Texas, the agent of the defendant in selling the plaintiff his ticket from Memphis to Birmingham, as is alleged he was? It appears that the two roads—the one from Waco to Memphis, and the other from that point to Birmingham—were connecting lines, and that the plaintiff purchased a coupon through ticket from Waco to Birmingham. In answer to interrogatories propounded by plaintiff to defendant, the company answered that the conductor on defendant's road did receive from plaintiff, on the 14th of September, 1897, a ticket or coupon from Memphis to Byhalia, said ticket or coupon purporting to have been issued by the St. Louis and Southwestern Railway Company; that it was impossible for it to state whether defendant had, prior to that time, placed on sale ²⁵⁵ at Waco, tickets over its railroad from Memphis to Birmingham; that defendant itself did not place such tickets on sale at Waco, and had no officer or agent at that point; that a railroad company frequently issues and places on sale tickets reading from points on its line to points on the other roads, and often, with coupons reading over several lines of roads between initial point and destination; that defendant could not say that it knew that tickets like the one received by said conductor were on sale at Waco; that it, however, did know that the St. Louis and Southwestern road sometimes issued and placed on sale tickets with coupons attached, reading to points on the line of defendant, and that that road collected the value of the entire ticket, remitting to defendant the amount due it, and such tickets had been issued and placed on sale by said St. Louis and Southwestern Company prior to September 14, 1897.

The general rule prevailing in this country, as is well understood, is, where there are connecting roads as here, that in the

absence of a special contract, or some relation between them, each is liable only for a loss or injury on his particular line or route: *Montgomery etc. R. R. Co. v. Moore*, 51 Ala. 391; *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Jones v. Cincinnati R. R. Co.*, 89 Ala. 376, 8 South. 61; *Georgia Pacific R. Co. v. Hughart*, 90 Ala. 36, 8 South. 62.

In *Southern Express Co. v. Hess*, 53 Ala. 19, it appeared that the Adams Express Company and the Southern connected at a point from which the one secured goods destined for points on the line of the other, and it was held that this fact constituted the one company the agent of the other, as to such freight, and its consignor and consignee, and if the company finally delivering the goods does not deliver them in the condition in which they were received by its agent—the company who issued the bill of lading—it must account for the injury. The same rule is in reason applicable in the sale of tickets to travelers over connecting lines. Hutchinson states the rule in such cases to the same effect, that “when the passenger has received from the carrier a number of coupon tickets, one for his passage over the route of the first, and others as passports over ²⁵⁶ the lines of succeeding carriers, . . . such tickets are held not to import a contract on the part of the first carrier, from whom they are received, to be responsible for the carriage of passengers beyond its own line. In such cases, the first carrier is considered rather in the light of an agent for the succeeding carriers, than as undertaking for the faithful discharge of their duty, and the coupons as in the nature of separate tickets on behalf of the successive carriers, and binding upon them in the same manner as if issued by themselves.” He cites numerous authorities to sustain the text: *Hutchinson on Carriers*, sec. 578.

In this case the defendant's own evidence, with nothing in conflict with it, is sufficient to sustain the agency of the Waco ticket agent, on behalf of defendant, to sell the ticket to plaintiff. The fact that defendant had no general agent or office at that point and itself did not place tickets there for sale is a matter of no consequence, if the other road with defendant's approval acted in this behalf for it. It was shown the defendant recognized and ratified the agency in receiving the ticket from plaintiff in favor of his fare on its own line, from Memphis to Byhalia.

3. “The law, settled by the great weight of authority, is, that the face of the ticket is conclusive evidence to the conductor

of the terms of the contract of carriage between the passenger and the company. . . . The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent": 4 Elliott on Railroads, sec. 1594. The author adds: "It does not necessarily follow, however, that the railroad company may not be liable where the passenger has, in fact, a right to his passage at the ticket rate, and he is afforded no opportunity to get a ticket, or is misled, or given a wrong or defective ticket by the company's agent, or the like." Hutchinson, taking the same view, holds, on the authority of cases he cites, that in the action for the recovery of damages sustained, the action must be for a breach of the contract: Hutchinson on Carriers, p. 674, sec. 580, note. Mr. Elliott ²⁵⁷ referring to the authorities which held that the passenger's remedy is an action for breach of the contract—without denying the right to sue in contract—says: "It must be that some of the cases to which we have just referred are contrary to the weight of authority, in holding that the only remedy is an action for breach of the contract, and in stating the measure of damages, but whether the action be in contract or in tort—for the breach of a contract or for the violation of a duty imposed by law—the gist of the action cannot well be the expulsion of the traveler where there is no unnecessary force in accordance with the rules of the company, when he has no ticket or evidence of his right to transportation valid on its face, or such as those rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled that a complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory": Elliott on Railroads, sec. 1594.

Mr. Freeman, in the note to *Commonwealth v. Power*, 41 Am. Dec. 465, 475, says: "If, by mistake of one of the officers of the company, he is not furnished with a proper ticket or check, evidencing his right to be carried to his destination, his right, nevertheless, remains, and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. . . . He [the traveler] should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as part of his damages, rea-

sonable compensation for the indignity put upon him by the company through the default of its servant," etc.: *McGhee v. Reynolds*, 117 Ala. 119, 23 South. 68.

4. The count in this case is treated by defendant in the demurrer interposed as one in contract and not in tort. Generally, the damages to which a passenger is entitled who has been injured by the negligence of the carrier are measured by the rule of compensation; but, as Mr. Hutchinson observes, "the elements which enter ²⁵⁸ into the question of compensation are so various, and in themselves so uncertain, that it furnishes in most cases only a rule for approximation of the actual damage, and must, after all, be left to the sound discretion of those whose province it is to decide the amount. Certain principles, however, have been settled as to what may be properly included within the meaning of the term 'compensation' which will serve as guides in the calculation. One of these rules is that the compensation of the injured party will not be confined to his mere pecuniary loss, but may embrace recompense for the pain and suffering of both body and mind which have resulted from the injury": *Western Union Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73; *Louisville etc. R. R. Co. v. Binion*, 107 Ala. 645, 18 South. 75.

We hold, therefore, that the measure of damages is not limited, as contended by defendant, to the cost of transportation from Byhalia to Birmingham.

It may be proper to add that we have found it unnecessary to decide in this case whether the plaintiff is confined for such damages as he claims to a suit on the contract, such as is admitted this one is, and cannot sue in tort, since it is nowhere disputed that an action in contract may be maintained.

The only demurrer to the third count was that it joined with an action in tort as set up in other counts, the third being in contract. But this objection cannot be considered, since all the other counts in the progress of the trial were either withdrawn by plaintiff, or the court charged there could be no recovery on them, as was stated in the first part of the opinion.

5. We have considered the only errors assigned, which have been insisted on in argument, except on the overruling of the motion for a new trial; and we have found nothing which in our judgment would justify us in setting the judgment aside on any of the grounds urged.

Affirmed.

If a Passenger is Expelled from a train because of a defective ticket sold him by an agent of the railway company, he may recover for such expulsion: *Krueger v. Chicago etc. Ry. Co.*, 68 Minn. 445, 64 Am. St. Rep. 487, 71 N. W. 683; *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, and cases cited in the cross-reference note thereto. And his recovery may include compensatory damages, such as for the humiliation suffered, and for the delay in completing his journey: *Hot Springs R. R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351. See, also, *Cleveland etc. Ry. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245, 69 N. E. 169.

Connecting Carriers are agents of each other to accomplish the carriage or transportation: *Missouri Pac. Ry. Co. v. Twiss*, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76; *Omaha etc. R. R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741, 74 N. W. 1066.

JESSE FRENCH PIANO AND ORGAN COMPANY v. PORTER.

[134 Ala. 302, 32 South. 608.]

INJUNCTIONS — Attorneys' Fees as Damages. — Attorneys' fees incurred in obtaining the dissolution of an injunction may be recovered as damages in an action on the injunction bond, and the measure of such fees recoverable is the fair and reasonable value of the services rendered. (p. 32.)

INJUNCTIONS—Dissolution—Attorneys' Fees on Appeal as Damages.—If a temporary injunction is dissolved, and an appeal taken, attorneys' fees incurred in successfully resisting the effort to have the decree of dissolution set aside are recoverable as damages in an action on the injunction bond. (p. 33.)

INJUNCTIONS—Dissolution—Damages—Accrual of Right of Action.—An action for damages may be maintained upon an injunction bond immediately upon the rendition of an interlocutory decree dissolving the preliminary injunction, without waiting for a final hearing of the cause in which the writ issued. (p. 33.)

TRIAL—Evidence.—A request for a direction to the jury to return a verdict for the defendant in a civil case, if there be an element of uncertainty in the evidence which it cannot solve, is erroneous, and properly refused. (p. 34.)

Gunter & Gunter, for the appellant.

Holloway & Holloway and W. L. Martin, for the respondent.

³⁰⁶ DOWDELL, J. This is a suit on an injunction bond, after dissolution of the injunction, to recover damages resulting from the suing out of the writ. The damages recoverable for breach of an injunction bond must be such as are the natural

and proximate result of the issuance of the writ. That attorney's fees incurred in procuring the dissolution of the injunction are such damages is not now to be questioned. The measure of such damage is the fair and reasonable value of the services rendered in procuring the dissolution of the injunction, and this without reference to the ratio the value of such services might bear to the value of services rendered throughout the entire case in which the injunction is obtained, but not to exceed which the plaintiff has contracted to pay in case the compensation has been agreed on and fixed between the plaintiff and his attorney. The price, however, fixed by contract between the plaintiff and attorney is not the measure of defendant's liability, since the plaintiff and attorney cannot by their contract place a liability on the defendant beyond and in excess of what would be fair and reasonable compensation for the services actually rendered. In the injunction suit an appeal was taken by the defendants from the decree of the chancellor dissolving the injunction, and it is now contended by appellants here that there can be no recovery in a suit on the injunction bond for attorney's fees incurred by the plaintiffs on such appeal. The purpose of the appeal was to review and reverse the decree dissolving the injunction, and the reversal of the decree would necessarily reinstate the injunction. ³⁰⁷ Attorney's fees incurred in resisting the effort to have the decree of dissolution set aside are as much the natural and proximate result of the issuance of the writ as are the fees incurred in procuring the dissolution in the first instance. There is no merit in the argument of counsel that attorney's fees for resisting an application for an injunction might as reasonably be claimed as damages in the suit as fees incurred after the decree of dissolution on the appeal from such decree. Fees incurred in resisting an application for the injunction cannot possibly be damages resulting from the issuance of the writ. The bond sued on contracts to pay damages caused by the issuance of the writ, and such as are the natural proximate consequence of its issuance, and not antecedent damages. It is insisted that what was said in *Bolting v. Tate*, 65 Ala. 417, 39 Am. Rep. 5, in this connection, is dictum, and should be departed from. We approve of the reasoning employed in that case, and now sanction as the law what is insisted by counsel was dictum: *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Jackson v. Millepaugh*, 100 Ala. 285, 14 South. 44; *Cooper v. Humes*, 93 Ala. 285, 9 South. 341.

A preliminary injunction, commonly spoken of as a temporary injunction, is granted pending a hearing on the merits, and only upon the complainant's entering into bond with surety conditioned and payable as required by law. The statute prescribes the condition, and that condition is, "to pay all damages and costs which any person may sustain by the suing out of such injunction, if the same is dissolved": Code, sec. 788. The writ is obtained upon an ex parte hearing, and the bond is required as a protection against the abuse of this extraordinary process, and to prevent oppression by its use. It is different from a permanent injunction in that it is preliminary to a hearing on the merits and by no means dependent on such hearing. A permanent injunction may be had on final hearing on the merits without the requirement of a bond; a preliminary injunction cannot. The bond is the contract of the party executing it, the statute prescribes its terms and conditions, and the right of action arises immediately upon the breach of its condition. The promise is to pay all ³⁰⁸ damages and costs, if the injunction is dissolved. The failure to pay all damages and costs sustained by the suing out of the writ, after the same has been dissolved, is a breach of the bond, and there is nothing in the statute nor in the bond which postpones the right of action until after a final hearing on the merits. There are cases to be found which hold that there can be no assessment of damages for suing out the writ until a final hearing of the cause in which the writ issued. We apprehend that these cases, however, are based upon a statute different from ours, or upon a bond differing in condition from the one here sued on. In 2 High on Injunctions, third edition, section 1649, it is said: "The general rule is, that upon the dissolution of an injunction and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues. Nor is it necessary that the obligee should first sue out an execution upon the decree dissolving the injunction, before instituting proceedings at law for a recovery upon the bond, but he may proceed immediately upon the dissolution. But if the bond is conditioned for the payment of such damages as may be sustained if the court shall finally decide that plaintiffs were not entitled to the injunction, no right of action accrues until the final determination of the suit, and the statute of limitation does not begin to run upon the bond until that time." This author states that it has been held, however, that no right of action at law can be maintained on the bond until the final de-

termination of the cause in which the injunction issued, citing *Gray v. Veirs*, 33 Md. 159, and *Penny v. Holberg*, 53 Miss. 567, but the general rule is otherwise as above stated.

The evidence in the case supported the averments of the complaint, and that, too, as shown by the bill of exceptions, without conflict. The fact that one of the witnesses who testified in behalf of the plaintiffs as to the value of the legal services rendered in procuring the dissolution of the injunction, based his opinion in part on what had been told him by one of the attorneys of the plaintiffs in the injunction suit as to the amount of service performed, raised up no conflict in the evidence.³⁰⁹ This evidence was admitted without objection from the defendant, and the fact that it was in along with other evidence that showed the value of the services rendered in no wise affected the probative force of such other evidence, or furnished any reason for not giving the affirmative charge requested by the plaintiffs.

Charge 3 requested by the defendant assumes that the opinions of witnesses were based on what was told them by Messrs. Holloway and other persons, when the bill of exceptions shows that the opinion of only one witness, as to the value of the service rendered, was based in part on what Mr. Holloway told the witness, and only Mr. Holloway and not other persons. The charge in this respect was abstract, and for that reason, if no other, was properly refused.

Charge 4 requires the jury to return a verdict for the defendant, if there be an element of uncertainty in the evidence which they cannot solve, notwithstanding the jury might otherwise be satisfied from the evidence of the plaintiff's right to recover. The charge is also faulty in that it requires the plaintiffs "to show to the jury by competent evidence the reasonable amount of the charges," etc., when there was incompetent evidence in the case, without objection from the defendant, which tended to show such reasonable amount of the charges, etc.

What we have already said in the foregoing opinion upon the questions involved disposes of the remaining charges, requested by the defendant, and which were refused by the court.

We find no error in the record, and the judgment is affirmed.

Mr. Justice Tyson Dissented from the proposition that an action may be maintained upon an injunction bond immediately upon the rendition of an interlocutory decree dissolving the preliminary injunction, without waiting for a final hearing of the cause upon the

merits, where the injunction may, in a proper case, be reinstated. He said: "Just how this conclusion is to be reconciled with the proposition decided, that attorneys' fees incurred in resisting the effort to reinstate the injunction by appeal to this court are recoverable in a suit on the bond, I confess my inability to see. For, if the right of action arose for a breach of the bond immediately upon the rendition of the decree dissolving the injunction, I am unable to comprehend how damages subsequently arising can be recovered. Indeed, two of the cases cited to support the conclusion that counsel fees incurred in resisting the effort in this court to reverse the interlocutory decree dissolving the injunction are recoverable, sustain the proposition I contend for, that until a final determination of the cause in which the writ of injunction is sued out, no suit can be maintained upon the bond." The cases mentioned are *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Jackson v. Millspaugh*, 100 Ala. 285, 14 South. 44; *Cooper v. Hames*, 93 Ala. 285, 9 South. 341.

Attorney's Fees for defending an injunction suit at the trial or for obtaining the dissolution of an injunction are recoverable as part of the damages in an action on the bond: *Hyatt v. Washington*, 20 Ind. App. 148, 67 Am. St. Rep. 248, 50 N. E. 402; *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; monographic note to *Winkler v. Roeder*, 8 Am. St. Rep. 161. But see *Curtis v. Bachman*, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910.

NEVILLE v. REED.

[134 Ala. 317, 32 South. 659.]

PARENT AND CHILD—Custody of Child.—A father's right to the custody of his child may be forfeited by misconduct, or lost by misfortune; and if he asserts his right to such custody by habeas corpus, the court may exercise a discretion for the present and future welfare and interest of the child, and leave it in the custody of its mother, or some other person, in preference to its father. (p. 36.)

PARENT AND CHILD—Custody of Child.—In a proceeding by a father to obtain the custody of his child, the character, calling and condition of the father will be considered, to ascertain whether he is suitable or unsuitable, or able or unable, to properly care for the child, and in determining such question the court may properly consult the child, having sufficient judgment, whether it prefers, for any good reason, to return to him or not. (p. 36.)

C. W. Tompkins, for the petitioner.

Fitts, Stoutz & Armbrecht, for the respondent.

320 HARALSON, J. The father is regarded as the head of the family, and the law commits the children to his charge, in preference to the claims of the mother, or any other person, and his right to their custody may be forfeited by misconduct or lost by his misfortunes; and as has been heretofore held, when he asserts his right to their custody, by habeas corpus, the court may exercise a discretion for the present and future welfare and interests of the infants, and leave them in the custody of the mother or some other person, in preference to the father: *Ex parte Boaz*, 31 Ala. 427.

This discretion is not to be exercised arbitrarily, but always with a view to the best interests of the children. The character, calling and condition of the father will be considered, to ascertain if he is suitable or unsuitable, or able or unable to properly care for his children, and in determining the question the court may very properly consult the children, having sufficient judgment, whether they prefer, for any good reasons, to return or not to him. Their feelings, attachments, preferences and contentment, are, within proper limitations, proper subjects of inquiry. Mental capacity, and not age, is the criterion as to whether the infant has sufficient judgment to chose for itself: *Brinster v. Compton*, 68 Ala. 300; 9 Am. & Eng. Ency. of Law. 1st ed., 245, 246.

Having reference to the calling, capacity, disposition and character of the petitioner, as tending to show his unfitness to take charge of the child, as shown by the legal evidence introduced on the trial, the capacity and superior qualifications of the defendant, Mrs. Reed, in custody of the child, the care, attention and advantages ³²¹ she is bestowing on him, and is anxious to continue to furnish as well as to the preference of the child—nine years old—as made known by him to the judge of probate, who examined him in reference to the matter, we are unable to conclude that the probate court erred in denying the application of the petitioner, and in remanding the infant to the custody of the defendant.

Affirmed.

A Father is Entitled to the Custody of his child, ordinarily; but, if the welfare of the child is thereby retarded, exception to the rule exists. Neither parent has any absolute right to the custody of a child; and the court may leave it where its interests will be best promoted: Miller v. Miller, 38 Fla. 227, 56 Am. St. Rep. 166, 20 South. 989; Hussey v. Whiting, 145 Ind. 580, 57 Am. St. Rep. 220, 44 N. E. 639; Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23. The

welfare of the child is the polar star by which the court is guided in awarding the custody as between contending parties: *Cunningham v. Barnes*, 37 W. Va. 746, 38 Am. St. Rep. 57, 17 S. E. 308. The choice of the child, when it has reached the age of intelligent discretion, should be consulted: *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212; *Marshall v. Reams*, 32 Fla. 499, 37 Am. St. Rep. 118, 14 South. 95. But before parents can be deprived of their child, a case must be made out sufficiently extravagant, singular, and wrong, to meet the condemnation of all decent and law-abiding people: *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660.

WHITAKER v. McKINNEY.

[134 Ala. 326, 32 South. 695.]

LACHES—**Probate of Will**.—The lapse of a third of a century between the admission of a will to probate and an application to annul the order admitting it, shows such laches on the part of the applicant as will bar him of relief. (p. 37.)

Petition to annul a decree admitting a will to probate on the ground that such decree was rendered without notice to one of the heirs and next of kin of the deceased. Judgment dismissing the petition and the petitioner appealed.

O. D. Street, for the appellant.

J. A. Lusk, for the respondent.

320 **SHARPE, J.** If it be assumed that the parties in interest who were not notified of the probate proceedings would have been entitled to have the judgment of probate set aside on timely application, still laches plainly imputable to appellant must prevail against his application. A third of a century is ordinarily sufficient to obscure a transaction such as the making of a will, and to make it difficult, if not impossible, to prove the contents of a lost will. A reproduction now of the evidence on which the contents of the will was established and the judgment was rendered in 1865 might be impracticable, and hence to set aside the judgment and open the way to a contest of the will would be at the imminent risk of allowing the appellant an advantage from his own unreasonable delay.

Affirmed.

The Conclusiveness of Orders granting or denying the probate of wills is considered in the monographic note to *Schultz v. Schultz*, 60 Am. Dec. 353-362. After the statutory limitation of two years from the probate of a will has expired, thereby barring all contest, the only question remaining open is the true construction of the instrument: *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, 18 South. 893. Laches as barring the right to relief are considered in the monographic notes to *Smith v. Thompson*, 54 Am. Dec. 130-134; *Bell v. Hudson*, 2 Am. St. Rep. 795-888. As to laches in applying for orders to sell the real property of a decedent, see the note to *Killough v. Hinton*, 26 Am. St. Rep. 22-29.

BESSEMER SAVINGS BANK v. ANDERSON.

[134 Ala. 343, 32 South. 716.]

GARNISHMENT—Liability for Payment of Funds on Deposit. If a garnishee bank by answer admits the possession of money deposited by the defendant in the original suit which it pays out to the garnishing creditor before judgment against it in the garnishment proceedings, it is not thereby relieved of liability for such fund to the original defendant. (p. 40.)

GARNISHMENT—Defenses.—To protect a garnishee as to a fund admitted to be in his hands, it must have been paid on a judgment in garnishment rendered against him, or as against the garnisher, the fund must have been paid over with his consent. (p. 40.)

GARNISHMENT—Conflicting Claims.—If a garnishee bank admits, by answer, the possession of money deposited by the defendant in the original suit, and previously thereto it has notice that such money is claimed by a third person, it is the duty of such garnishee, in making answer, to make known that it has been notified of such claim, and if it fails in this, and pays the money after notice of such claim, it does so at its peril. (p. 40.)

TRIAL—Instructions.—The mere failure of the trial judge to mark "given" on a charge requested by plaintiff and given by the court, is not reversible error, in the absence of exception taken at the time. (p. 40.)

P. Scott, for the appellant.

Ward & Drennen, for the respondent.

345 HARALSON, J. R. W. Anderson was sued in the justice's court March 26, 1900, by J. H. Johnson, and judgment was rendered against him therein March 31, 1900, in favor of the plaintiff, for \$57.51. To collect the debt, the plaintiff garnished the Bessemer Savings Bank. The garnishee, on April 5, 1900, appeared on summons, and answered an indebtedness of \$410. It did not set up in its answer that the plaintiff in this suit claimed said fund. The proof on the part of plaintiff

showed, without dispute, that the garnishee was notified by the defendant, R. W. Anderson, and by the plaintiff, before it made answer to the garnishment writ, that \$370 of the fund garnished belonged to the plaintiff. The garnishee, according to plaintiff's evidence, afterward paid \$310 to the plaintiff, leaving in its hands \$60, which plaintiff claimed, and which this suit is brought to recover. The proof also showed, without conflict, that the money in the hands of the bank had been deposited therein by R. W. Anderson to his individual credit, but he and the plaintiff, his wife, both testified, and there is no proof to the contrary that the money belonged to the plaintiff; and the proof also shows, without dispute, that when said R. W. Anderson made the deposits, he informed the cashier that the funds belonged to the plaintiff, except \$40 of it.

It was also shown that proceedings in bankruptcy had been instituted in the United States bankrupt court against said R. W. Anderson, but that the same had been dismissed by the order of that court, on the 7th of July, 1900, at said Anderson's cost. The proof also tends to show that these costs, amounting to \$10.15, were paid to the clerk of that court by the garnishee, on the 12th of July, 1900, but it is not shown that the same were paid by any judgment against the garnishee, nor by the order of said R. W. Anderson. It further appears that the garnishee paid to the justice of the peace in said garnishment proceedings against it, on the 10th of July, 1900,³⁴⁶ the sum of \$59.85, these two amounts making \$110, the sum admitted by garnishee to be in its hands belonging to said defendant R. W. Anderson, but it appears that no judgment in said justice's court had been rendered against garnishee for that or any other sum, nor did it appear that the same was paid with the knowledge, or by the direction of the plaintiff, but the same was a voluntary payment so far as is made to appear.

The plaintiff's evidence tended to show that the \$310 paid by the garnishee, after garnishment, out of the deposits made by the defendant, was paid to plaintiff. The president of the garnished bank testified that it was paid to the husband of the plaintiff. But this is immaterial. There was left in the hands of the garnishee, without any question, the sum of \$60, claimed by the plaintiff and here sued for. The garnishee admitted that it had \$410 in its hands deposited there by defendant, and seeks to defend this suit on the grounds that the money in its hands was not the money of plaintiff, and she has no right to sue for and collect the same, in any event, and that the money paid to the justice of the peace in said garnishment proceeding, and the

costs paid to the clerk of the United States court in said bankruptcy proceeding, constitute a discharge of liability for said fund. But this defense cannot avail it. To protect it, the fund must have been paid on a judgment in garnishment rendered against it, or, as against the garnishor, that it was paid with her consent: *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 481; *Ross v. Pitts*, 39 Ala. 606; 8 Am. & Eng. Ency. of Law, 1197.

It is true that when said R. W. Anderson deposited the money in bank to his individual credit, that fact, without more, showed prima facie that it belonged to him, but not conclusively so. If it really belongs to plaintiff, the fact that her husband, to whom she intrusted it, to be kept for her, deposited it in bank to his own credit, did not change her title to it. That it did belong to her, he and she both swear, and he, that he so notified the bank at the time he made the deposit, and there is no evidence to the contrary. It is also undisputed that after the writ of garnishment was served, ³⁴⁷ and before the garnishee answered garnishee was notified that plaintiff claimed \$370 of the fund in its hand. It was the duty of the garnishee in making answer to make known that it had been notified that plaintiff claimed the fund or a part of it in his hands, and if it failed and paid after notice of such claim, it did so at its peril. Such failure precluded plaintiff from asserting her claim to the fund in the justice's court: *Lewin v. Insurance Co.*, 62 Ala. 221; *Donald v. Nelson*, 95 Ala. 111, 10 South. 317; *Woodlawn v. Purvis*, 108 Ala. 513, 18 South. 530.

The mere fact that the trial judge did not mark "Given" on a charge which was requested by plaintiff and which was given, is not reversible error. The defendant did not direct the attention of the court to the failure, and took no exception at the time. For aught appearing, the failure of the judge to so mark the charge was a mere inadvertence: *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

Affirmed.

The Service of Trustee Process is sufficient notice to the trustee that the ownership of funds in his hands is in question, and he should await the judgment of the court before paying the funds to anyone. Not to do so is to act at his peril: *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220. If a bank, at the time of service of garnishment upon it, knows that a fund in its hands belongs to the defendant in attachment, it is liable as garnishee for such fund subsequently paid over, although the deposit stands in the name of a third person: *Ferry v. Home Sav. Bank*, 114 Mich. 321, 68 Am. St. Rep. 487, 72 N. W. 181.

CARTER v. FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

[134 Ala. 369, 32 South. 632.]

SURETYSHIP—Contribution—Sufficiency of Bill.—A bill by one surety on a tax collector's bond against a surety on another of such bonds for contribution, alleging that the bond upon which defendant was surety, was executed on April 10, 1897, and that such tax collector, "on the first day of July, 1897, defaulted in failing to pay over to the county" a designated sum, is not subject to demurrer upon the ground that it fails to allege that such tax collector converted such money subsequently to the date of the execution of defendant's bond. (p. 43.)

SURETYSHIP—Contribution—Costs of Suit.—A surety upon an official bond, who has paid the judgment and costs recovered against him, is entitled to contribution from his cosurety, not only for the amount of their principal's default, but also for the amount of the costs of the suit in which such default was established, if such costs were not frivolously nor needlessly expended in defending the suit. (p. 44.)

F. K. Bumberg, for the appellant.

Bestor, Gray & Bestor, for the respondent.

372 TYSON, J. The bill in this cause was filed by a surety upon one of a series of bonds executed by E. B. Lott, as tax collector of Mobile county, against certain of the sureties upon other bonds for contribution. It appears from the bill as amended that on the twenty-second day of August, 1896, Lott executed a bond as tax collector of Mobile county in the penalty of \$100,000, with certain of the respondents as sureties thereon; that this bond was approved by the judge of probate and Lott entered upon the duties of the office as such tax collector, and continued therein until the fifteenth day of September, 1897, when he resigned his office. It further appears that in 1896, in compliance with the recommendations of the grand jury of Mobile county, Lott was required to give additional security in the sum of \$50,000 as such tax collector, and on the fourteenth day of January, 1897, he gave bond in said sum with sureties which was approved by the judge of probate. It also further appears that upon the application of one of the sureties upon the last-mentioned bond for his discharge as surety "notice was issued to Lott ordering him to file a new additional bond as said tax collector of Mobile county on or before March 31, 1897. That in compliance therewith said Lott, as such tax collector."

gave four bonds with different sureties aggregating in amount \$50,000, which were taken and approved by the judge of probate of said ³⁷³ county on the tenth day of April, 1897. The bill as amended further avers "that said Lott continued to act under said bonds as such tax collector and that the sureties upon said bonds were not thereafter in any manner discharged as sureties upon said bonds." On the fifteenth day of June, 1897, the complainant in the bill became sole surety upon another bond or Lott as tax collector. It is also further averred that Lott, as tax collector, on the first day of July, 1897, defaulted in failing to pay over to the county of Mobile as required by law the sum of \$12,309.51, the amount of the taxes which he had collected for the county which he failed to pay over, and that there was in force at the time of such default the six bonds above stated aggregating \$200,000. It is further averred that the county of Mobile brought suit against the complainant as surety of said Lott on the twenty-seventh day of September, 1897, for the sum of \$23,062.51, claiming said sum to be the amount which Lott as tax collector should have accounted for and paid over to the said county of Mobile on the first day of July, 1897; that it became necessary for complainant to defend said suit and by reason of such defense said amount so claimed was reduced to \$13,797.69, for which the county obtained judgment against the complainant, together with the costs of court; that complainant appealed and the judgment was thereafter affirmed for the above amount with interest, damages and costs amounting to \$16,547.47, which complainant paid to the clerk of the circuit court of Mobile county on the twentieth day of February, 1900. It is further averred that complainant paid in addition the sum of \$76.10 costs of said appeal, amounting in the aggregate to \$16,623.57. The bill also avers that defenses were interposed by the complainant in the suit against it by the county that went to its entire claim, and the adverse ruling upon one of the defenses, stated in the bill, was the ground of appeal to this court.

The prayer of the bill is that the defendants, sureties upon the other bonds given by Lott as tax collector, be required to contribute to the payment of the amount paid by complainant for his default, inclusive of costs of court and damages upon appeal, in proportion to the penalties of their respective bonds.

³⁷⁴ The bill as amended was demurred to, and the demurrers being overruled, this appeal is prosecuted to review that decree. The only demurrer insisted upon in argument here was inter-

posed by Carter, one of the sureties upon one of the four bonds given on the tenth day of April, 1897, the penalty of which is \$25,000. It is insisted by this demurrer, consisting of many grounds, that the bill is defective in failing to allege that tax collector Lott converted money of the county subsequent to the tenth day of April, 1897, the date of the execution of demurrant's bond. The averment in the bill, in this respect, to repeat, is that "said Lott, as tax collector, on the first day of July, 1897, defaulted in failing to pay over to the county of Mobile, as required by law, the sum of \$12,309.54," etc. Proof of this fact we held in *Fidelity etc. Co. v. Mobile Co.*, 124 Ala. 146, 27 South. 386, was sufficient to authorize a judgment in favor of the county against the surety upon the tax collector's bond, and that the claim by the surety that the default had in fact occurred prior to the execution of the bond was, if sufficient excuse, defensive matter. The allegation of the default of the principal alleged in the bill would have been sufficient if appellant had been sued by the county, and no good reason can be given why it should not be sufficient when sued by a surety, who had paid such default, for contribution. If the default of the principal occurred prior to the execution of the bond by appellant, that is matter of defense for him to invoke.

It is next insisted that the right to contribution is limited to the actual default of the principal, and should not, and cannot, embrace the costs of the suit against the surety in which such default was established. It is doubtless true that when the defense of a suit by the creditor against a surety was needless or frivolous, the cost of such suit cannot be included in the claim of the surety for contribution. He cannot, of course, claim for the consequences of his own wrong. Such was the case of *Jones v. Jones*, 16 Ala. 545, relied upon by appellant. The surety there was secured by a deed of trust to which he could have resorted for the payment ³⁷⁵ of the principal's default. It was needless for him to have suffered suit, having funds in his own hands out of which he could have discharged the debt. While authorities are cited, and expressions used in the opinion of the court in that case indicating that the surety can never claim contribution as to the costs and damages of a suit against him by the creditor, the decision to this extent was unnecessary, and the reasons given therefor are not sound. It was said that the surety has the right to stand upon the terms of his contract which is limited to the payment of the principal's default, and that it was the duty of the surety to pay the debt, if just, when

demanded by the creditor. It has been repeatedly held that the right to contribution does not depend on contract. "It is a principle of equity, having its foundation in natural justice, that when one discharges more than his just portion of a common burden, another, who has received the benefit, ought to refund to him a ratable proportion": *Owen v. McGehee*, 61 Ala. 440. And while it was the duty of the surety to pay the debt, if just, when demanded by the creditor, the duty rested equally upon the cosurety who was not sued. While it is true a surety is not bound to await the bringing of suit by the creditor in order to entitle him to contribution, we know of no rule which compels him to accept the amount claimed by the creditor as just and correct, nor of any rule which makes his determination of its validity or amount conclusive upon his cosurety. If the creditor having a claim against several sureties may select the one he wishes to sue, and the one sued is limited in his right of contribution to the actual default of the principal exclusive of the costs of suit, he can, by his selection, to the extent of the costs of the suit, make a victim of the surety sued, and thus make the common burden personal oppression. We think the true rule is that where the surety obtains any advantage from the suit, or where, although the resistance of the suit was unsuccessful, there was reasonable ground of defense, if he acted as a prudent man would, in the light of facts and circumstances showing a probability of success in whole or in part, the surety sued should be entitled to include the costs and damages ³⁷⁶ of the suit in his claim for contribution against his cosureties. His cosureties ought not, and cannot, complain, for the burden of paying the debt rested equally upon them, and they could have prevented suit, or even stopped it after its commencement, by paying the demand of the creditor. The extra liability for the costs and damages of suit, not frivolously nor needlessly defended, should not be imposed upon one of several equally bound at the caprice of the common creditor, any more than the payment of the debt itself. Particularly is this true where, as in the case in hand, the amount of the common liability is not necessarily the amount named in the bond or instrument, but must have been ascertained by matter extraneous thereto: 3 Am. & Eng. Dec. in Eq. 171; 7 Am. & Eng. Ency. of Law, 2d ed., 344; 1 Brandt on Suretyship, sec. 283. According to the averments of the bill, in consequence of the defense of the suit by complainant, the demand of the common creditor was reduced in the lower court from \$23,062.51 to \$13,797.69.

The defense of the suit, therefore, was not only reasonable, but was a manifest advantage to the other sureties, and we are not prepared to hold that the prosecution of the appeal to this court was unreasonable.

The contention that the bond upon which appellant Carter was surety was not a statutory bond is without merit. The bill clearly avers that Lott, as tax collector, was required under the statutes to give the bond and that it was acted under by him. Therefore, although it may be subject to objection as to penalty, time of approval, etc., its stands by virtue of the statute in the place of the official bond, subject to all the remedies of a bond executed, approved and filed according to law (Code 1896, sec. 3089; Code 1886, sec. 175), including those conferred by sections 300 and 286 of the Code of 1886 (sections 3132 and 3113 of Code of 1896) upon sureties among themselves.

Nor is the objection to the dismissal of the bill as to two of the sureties who paid to complainant their proportion of the debt well taken. The liability of appellant Carter was not thereby increased.

377 We have considered the objections raised by the demurrer to the bills which have been argued, and we find no error in the decree.

Affirmed.

A Surety is Entitled to Contribution for costs and expenses in defending a suit, including counsel fees, if the defense was prudent: *Connolly v. Dolan*, 22 R. I. 60, 84 Am. St. Rep. 816, 46 Atl. 36; *Gross v. Davis*, 87 Tenn. 226, 10 Am. St. Rep. 635, 11 S. W. 92.

MILLIKIN & CO. v. CARMICHAEL & FLYNT.

[134 Ala. 623, 33 South. 9.]

HOMESTEADS—Lease of Interest in Before Final Proof of Entry.—A lease of the timber interest in a homestead executed before final proof is made of the homestead entry of the land is absolutely void. (p. 46.)

R. D. Crawford and W. W. Sanders, for the appellant.

H. A. Pierce, for the respondent.

624 DOWDELL, J. The undisputed facts in this case show that the lease under which the complainants claim was

executed by Burns and wife to Nimmoicks & Melvin on December 21, 1896, and that at this time Burns and wife were residing upon the land, which had been entered by Burns under the homestead law of the United States, the same being government land. That Burns had not at the time, and not until two days later, on December ⁶²⁵ 23d, perfected his entry and received certificate of homestead on final proof of entry. That the execution of the lease was not acknowledged before any officer, but was attested by one witness. That on May 25, 1897, the lease was transferred by Nimmoicks & Melvin to the Peacock & Hunt Naval Stores Company, and afterward by the latter to the complainant Carmichael, and by him of an undivided half interest to the co-complainant Flynt. That on May 27, 1897, an acknowledgment of its execution was made by Burns and wife before an officer in the prescribed form of the Code for the conveyance of the homestead. That at the time of this acknowledgment by Burns and wife there was no redelivery of the lease, nor any additional or new consideration, but simply an acknowledgment by them of its execution of the date of its delivery, December 21, 1896.

It is conceded in argument that without the wife's acknowledgment taken separate and apart from the husband, the lease was void, but it is contended that the subsequent acknowledgment validated what was otherwise a void deed. If the lessors, Burns and wife, at the time of the execution of the lease, had been clothed with the right to make the same, this contention would be sound and find support in adjudication by this court. But such is not the case before us. The lease was void for another reason than that of a lack of sufficient acknowledgment by the wife for the conveyance of the homestead. At the date of its execution, the homestead entry not having been perfected, Burns was prohibited under the homestead law of the United States on grounds of public policy from conveying or making any contract to convey any interest in the land, and any conveyance by him was absolutely void: *Anderson v. Corkins*, 135 U. S. 483, 10 Sup. Ct. Rep. 905; *Mulloy v. Cook*, 101 Ala. 178, 10 South. 349, 17 South. 899; *Woodstock Iron Co. v. Strickland*, 121 Ala. 616, 25 South. 818. The subsequent acknowledgment by Burns and wife was nothing but a formal admission by them of their execution of the lease of December 21, 1896. This certainly could give no more validity to the deed than if the acknowledgment had been made at the time of its execution, and yet if it had been so made, the lease, notwithstanding, would

have ⁶²⁶ been void. It is wholly different in principle from the case of a conveyance by husband and wife of the homestead where they have the legal right to convey, and the conveyance fails by reason of a noncompliance with a prescribed form, which they have a right to, and may, remedy by subsequent acts. In such case it is the omission that avoids the deed, and which may be remedied by the parties. In the case before us it is the commission, or the act itself, and that which is forbidden on grounds of public policy, that avoids the deed, and it is not in the power of the parties to give validity to the act. This view of the case renders it unnecessary to notice other questions raised in the record and discussed in the briefs of counsel.

The cause was submitted for final decree upon the pleadings and proof, and a decree was rendered granting the complainants relief prayed for. For the reasons above given the decree will be reversed, and a decree will be here rendered dissolving the injunction and dismissing complainant's bill.

Reversed and rendered.

A Pre-emptor Acquires no Estate in public lands until the amount of the purchase money has been paid: Wittenbrock v. Wheaton, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664. And it is held that a contract to sell and convey land taken up under the homestead laws, made before final proof, is void: Moffatt v. Bulson, 31 Am. St. Rep. 192. See, also, Pevey v. Jones, 71 Miss. 647, 42 Am. St. Rep. 486, 16 South. 252; Anderson v. Yoakum, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. 500. A valid mortgage, so it is held in Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400, may be made upon government land, entered under the homestead act, prior to the issuance of a patent, if title is subsequently acquired. See the monographic note to Wilcox v. John, 52 Am. St. Rep. 249-254, on encumbrances by claimants of public lands.

HENLEY v. JOHNSTON.

[134 Ala. 646, 32 South. 1009.]

ADMINISTRATOR'S SALES—Petition for by Authorized Person.—It is essential to the validity of a decree for the sale of land of a decedent to pay debts that the proceeding be instituted and maintained by the personal representative of the deceased. (p. 49.)

ADMINISTRATOR'S SALES.—A decree for the sale of decedent's land for the payment of debts is void, if the petitioner's appointment as administrator de bonis non is void. (p. 49.)

JURISDICTION of Probate Courts—Presumption.—It must be presumed that there was a vacancy in the administration by resignation or removal of the former administrator, to sustain an order of the probate court granting letters of administration de bonis non. (p. 49.)

ADMINISTRATORS DE BONIS NON—Validity of Appointment.—Averments in a petition for letters of administration de bonis non, showing that the petitioner was the former administrator and had performed the duties of his office, that his final account was stated, audited, and approved on a certain date, that there were unadministered assets of the estate, unpaid debts, and that the estate was insolvent, are sufficient to give the court jurisdiction to appoint an administrator de bonis non without an averment that such former administrator had been finally discharged by order of court. (p. 49.)

ADMINISTRATOR'S SALES—Insolvent Estate.—On a petition for the sale of lands of an insolvent estate to pay debts, the decree of insolvency makes a prima facie case of necessity for the sale, dispensing with the necessity of taking depositions as in chancery cases, and substituting such decree for proof of the existence of debts, and insufficiency of personal assets. (p. 50.)

ADMINISTRATOR'S SALES—Allegation of Ownership.—A petition for the sale of lands of a decedent to pay debts sufficiently shows his legal title or equitable right therein at the time of his death, when it alleges that he "died seised and possessed of certain interests and rights" in such land, not definitely known to the petitioner. (p. 50.)

ADMINISTRATOR'S SALES — Description of Land. — If neither the petition for the sale of lands of a decedent to pay debts nor the decree thereunder sufficiently describes the land to indicate with any degree of accuracy in what section, township, and range they are located, when such description is attempted, the decree and sale is defective and may be set aside. (p. 51.)

Smith & Smith, for the appellant.

F. Johnston, for the respondent.

649 **TYSON, J.** The order of the probate court granting letters of administration is not appealed from, and its validity

is only involved in the attack made upon the decree ordering a sale of the lands of the intestate to pay debts upon the petition of the administrator to whom letters of administration *de bonis non* had been heretofore granted. The right to prefer the application to have the lands sold to pay debts devolves alone upon ⁶⁵⁰ the personal representative. It is, therefore, essential to the validity of the decree of sale that the proceeding be instituted and maintained by him: Code, sec. 155; *Landford v. Dunklin*, 71 Ala. 594. It follows, therefore, that if the petitioner's appointment as administrator *de bonis non* was void, that the decree of sale was void. Was his appointment void? In answering this question it is well to bear in mind that this is a collateral attack upon the order granting the letters to him. In the matter of appointment of an administrator *de bonis non* courts of probate are courts of original, unlimited and general jurisdiction, just as they are in the exercise of their jurisdiction in the appointment of an administrator in chief. "Nothing is intended to be without its jurisdiction except that which so appears specifically." In other words, it must be presumed, in the absence of an affirmative showing to the contrary, that there was a vacancy in the administration by resignation or removal of the former administrator to sustain the order of the court in granting the letters: *Ikelheimer v. Chapman*, 32 Ala. 676; *Sims v. Waters*, 65 Ala. 442; *Gray v. Cruise*, 36 Ala. 559; *Allen v. Kellam*, 69 Ala. 442; *Bean v. Chapman*, 73 Ala. 140; *Landford v. Dunklin*, 71 Ala. 594.

In the petition for letters it is shown that the petitioner had been former administrator and had performed the duties of said administration, his final accounts being audited, stated and approved on about the twelfth day of February, 1894, and that there are assets belonging to said estate unadministered, that the estate is insolvent and that the debts have never been paid in full.

It is not shown by the averments of this petition or otherwise whether the petitioner as former administrator had been discharged by an order from his office as administrator. If he had, the fact that he made a final settlement and was discharged is entirely consistent with the presumption that he did so after resigning or his removal for cause from office. If he was not discharged by an order, then the order appointing him administrator *de bonis non* and his act of qualifying as such amounted to a relinquishment or resignation of his ⁶⁵¹ former letters: *Turner v. Wilkins*, 56 Ala. 173. So, then, in either

aspect, the grant of letters is not void; and as administrator de bonis non he is the proper person to make application for the sale of the lands of the decedent to pay the debts of the estate.

It cannot be doubted that the lands are subject to the payment of the debts of the decedent if the personal property is insufficient to pay them, and that they may be subjected by the probate court upon proper application of the administrator de bonis non. That they are still the property of the decedent and that there are debts still unpaid is clearly shown by the averments of the petition. It is also shown that the personal property was insufficient to pay the debts, and the estate has been decreed to be insolvent by a court of competent jurisdiction. The decree of insolvency makes a prima facie case of necessity for the sale of the lands, dispensing with the necessity of taking depositions as in chancery cases, substituting the decree for proof of the existence of debts and of the insufficiency of personal assets: Code, sec. 326; *Meadows v. Meadows*, 78 Ala. 240; *Dolan v. Dolan*, 89 Ala. 256, 7 South. 425; *Chandler v. Wynne*, 85 Ala. 301, 4 South. 653.

It is insisted, however, that the decree of sale should not stand because it appears that the former administration of the estate was had in the chancery court. This may be conceded, but it is not made to appear that the administration is still pending in that court. For aught appearing, that court has wound up the former administration and has not now a right to exercise its jurisdiction in the further administration of the estate. No objection or defense of this sort appears to have been interposed in the court below, and there is nothing in the record which would justify the conclusion that the fact exists. We certainly cannot presume it in face of the rule that requires us to indulge the presumption of correctness in favor of the decree appealed from until error is shown.

Again, it is objected that the petition is defective, in that it fails to show by the allegations that the decedent, at the time of his death, had or owned either a ⁶⁵² legal or equitable right or interest in the lands sought to be sold. There is no merit in this contention. It is distinctly averred that he "died seised and possessed of the following described real estate, to wit: Certain interests and rights, not definitely known to your petitioner in and to about forty-eight tracts of land." etc. It is of no consequence that the interest and rights of the decedent in and to the lands were not definitely known to the petitioner. The fact necessary to be averred is that the decedent owned

either a legal or equitable right or interest in the lands sought to be sold: *Jones v. Woodstock Iron Co.*, 95 Ala. 551, 10 South. 635. However, it is indispensable that the petition accurately describe the lands: Code, sec. 158; *Gilchrist v. Shackelford*, 72 Ala. 7; *Wright v. Ware*, 50 Ala. 519. This was not done. Neither does the decree accurately describe them. There is nothing to indicate, with any degree of accuracy, in what section, township and range they are located. Not even the initial letters denoting the section, township and range used to indicate their location by the government survey. It is true some figures are set down, for instance, "8—13—5 opposite to E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ —E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$," but what these figures denote or represent is matter purely conjectural. This omission renders the petition defective, for which the decree must be reversed: *Wright v. Ware*, 50 Ala. 519; *Long v. Pace*, 42 Ala. 495.

Reversed and remanded.

Executors and Administrators.—The common-law powers of executors and administrators are considered in the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 171-207. Collateral attack on the right of an acting administrator is considered in the monographic note to *Dobler v. Strobel*, 81 Am. St. Rep. 535-562. And administrators de bonis non are considered in the monographic note to *Potts v. Smith*, 24 Am. Dec. 379-390.

Administrators' Sales.—A petition filed by an administrator de bonis non with the will annexed for the sale of the decedent's lands, which alleges that the estate is owing debts to a certain amount, that the personal property is insufficient to pay them, and that the will gives no power to sell the lands, is sufficient to confer jurisdiction on the court to order the sale: *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100, 20 South. 994. But the power of a probate court to direct the sale of a decedent's realty for the payment of debts arises only upon the presentation by the legal and regular administrator of the petition prescribed by law: *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 420. To require an accurate and exact description of the property in the petition is too strict a rule: *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551. For an insufficient description, see *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

PRIM & KIMBELL v. HAMMEL.

[134 Ala. 652, 32 South. 1006.]

ALTERATION OF WRITINGS.—The avoidance of a contract by a material alteration after its execution by an interested party, without the knowledge and consent of the maker, does not depend on the question of detriment to the maker. (p. 53.)

NEGOTIABLE INSTRUMENTS—Marginal Figures.—If the marginal figures on a bill or note do not correspond with the amount written in the body of the instrument the latter will always control. The marginal figures are no part of the instrument. (p. 53.)

ALTERATION OF WRITINGS—Marginal Figures.—If the amount is expressed in the body of a note, an alteration in the marginal figures is not a material alteration. (p. 53.)

NEGOTIABLE INSTRUMENTS—Signature in Blank.—The maker, by signing and delivering his note in blank, thereby authorizes the payee to fill in the blank. (p. 53.)

NEGOTIABLE INSTRUMENTS—Filling in Blanks.—If authority to fill blanks, left in a negotiable instrument, has been exceeded, the instrument is, nevertheless, enforceable in the hands of a transferee for value, who comes regularly by it, without notice that the authority has been exceeded. (p. 54.)

NEGOTIABLE INSTRUMENTS—Defenses.—A negotiable note, transferred to secure a pre-existing debt, makes the transferee a bona fide holder for value, and the note in his hands is not subject to equities between the original parties of which he has no notice. (p. 54.)

NEGOTIABLE INSTRUMENTS—Defense of Payment.—Payment by the maker to the original payee is no defense as against the transferee of a negotiable instrument for value, before maturity, and without notice. (p. 54.)

NEGOTIABLE INSTRUMENTS—Defenses.—If a negotiable note is indorsed and delivered to one individually, who sues thereon, evidence of the extent of the indebtedness of the payees to a partnership of which the holder of the note is a member, is not material or admissible. (p. 54.)

W. D. Dunn and McIntosh & Rich, for the appellants.

Fitts, Stoutz & Armbrecht, for the respondents.

654 DOWDELL, J. The instrument sued on was drawn up by the payee, Fitzpatrick & Co., leaving a blank to be filled in by the makers with the amount, but with marginal figures of "\$1,500," and in this form was sent to the defendants, Prim & Kimbell, for execution, and it was by them signed and returned to Fitzpatrick & Co., without writing any amount in the body, but leaving the blank to be filled in by the payee. Fitzpatrick & Co. filled in the blank by writing, "one thousand dollars,"

and changed the marginal figures from \$1,500 to \$1,000, to correspond with the writing in the body of the paper. Fitzpatrick & Co. then indorsed the instrument in blank, and before maturity delivered the same to the plaintiff as collateral security on a debt then owing by them to him, and in consideration of an extension by the plaintiff of their said indebtedness. It is not pretended that the plaintiff had any knowledge, at or prior to the time of the transfer of the paper to him, of the alteration of the marginal figures by Fitzpatrick & Co.

The instrument by the statute is made negotiable paper: Code, sec. 869; Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120, 26 South. 205, and authorities there cited. Did the changing of the marginal figures from "\$1,500" to "\$1,000" constitute such an alteration as to avoid the contract? It is evident that the change which was made was in the interest of the makers, and consequently of no detriment to them. But avoiding a contract by a material alteration after its execution by an interested party without the knowledge and consent of the maker does not depend on the ⁶⁵⁵ question of detriment to the maker: See Brown v. Johnson Bros., 127 Ala. 292, 85 Am. St. Rep. 134, 28 South. 579, where the subject is discussed and authorities cited.

It is a well-settled proposition of law that in a bill or note, where the figures in the margin do not correspond with the amount written in the body, the latter will always control. It has been held that the marginal figures are no part of the bill or note: Smith v. Smith, 53 Am. Dec. 652, and notes to that case. In 1 Daniel on Negotiable Instruments, third edition, page 96, section 86, it is said: "Marginal figures are really not a part of the instrument, but a mere memorandum of the amount": See, also, 4 Am. & Eng. Ency. of Law, 2d ed., 130. But without determining how far the marginal figures are a material part of the instrument where no amount is expressed in the body, we are satisfied on authority and reason that where the amount is written in the body of the instrument, the marginal figures do not constitute such a material part as that an alteration of the same would amount to a material alteration of the contract. Since the writing in the body controls, the marginal figures are wholly unimportant. If Prim & Kimbell had filled in the blank by writing "one thousand dollars," it is quite clear that the subsequent change of the marginal figures of \$1,500 to \$1,000, to correspond with the writing in the body, would have made no material alteration in the

contract. Signing the note in blank as was done, and returning it to the payee in that condition, was authority to the payee to fill in the blank: *First Nat. Bank v. Johnston*, 97 Ala. 664, 11 South. 690; *Robertson v. Smith*, 18 Ala. 225; *Huntington v. Bank*, 3 Ala. 186. Where authority to fill blanks left in a negotiable instrument has been exceeded, the instrument, notwithstanding, will be enforceable in the hands of a transferee for value who comes regularly by it without notice that the authority had been exceeded: *Winter v. Pool*, 104 Ala. 583, 16 South. 543; *Huntington v. Bank*, 3 Ala. 186; 2 Am. & Eng. Ency. of Law, 1st ed., 340, and note 4. Whatever may have been the effect as between the payee and maker as to the marginal figures indicating what amount the maker intended for the payee to fill in the blank left ⁶⁵⁶ in the instrument, we need not decide; but in such case, for the same reason that a negotiable instrument in the hands of an innocent transferee for value in due course of business is enforceable, where the authority given to fill blanks has been exceeded, the understanding or intention of the maker and payee, or either of them, could not affect the right of an innocent transferee for value. A negotiable note transferred to secure a pre-existing debt makes the transferee a bona fide holder for value, and the note in his hands is not subject to equities between original parties of which he had no notice; *Louisville Banking Co. v. Howard & Kornegay*, 123 Ala. 380, 82 Am. St. Rep. 126, 26 South. 207; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120, 26 South. 205; *First Nat. Bank v. Johnston*, 97 Ala. 655, 11 South. 690; *Spira v. Hornthall*, 77 Ala. 145; *Connerly v. Planters' etc. Ins. Co.*, 66 Ala. 432. To the plea of payment there was a special replication, which averred that plaintiff acquired the note or instrument sued on by indorsement before maturity for value, and that said note was never paid to plaintiff or anyone for him by him authorized, and issuance was joined on this replication. Having made the note negotiable and put it in circulation, the holder became the only payee with whom the maker could settle, and it is no defense to the suit to show that the maker paid the original payee. The instrument was indorsed in blank and delivered to L. Hammel. The suit was brought in the name of Hammel individually, and there was no error in sustaining plaintiff's objection to the question whether Fitzpatrick & Co. were indebted to L. Hammel & Co.

The seventh and eighth assignments of error are expressly waived in argument by counsel.

What we have said disposes of the questions presented in the remaining assignments of error.

We find nothing in the rulings of the circuit court complained of prejudicial to the rights of the appellants.

Let the judgment be affirmed.

Alteration of Writings.—The marginal figures are not a part of a note, and their alteration, in the absence of fraud, is immaterial: *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907. In determining the materiality of an alteration, it is equally unimportant whether the alteration was beneficial or injurious to the party whom it is sought to be charged on the instrument: See the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 87, on the unauthorized alteration of writings.

Filling Blanks.—Where one has intrusted an instrument containing blanks to another, with the intent to be bound thereon, he will be liable upon the instrument, though the blanks be filled in an amount or manner not intended by him. He is deemed to have given an implied authority to the payee or holder to fill the blanks with the proper terms: See the monographic note to *Burgess v. Blake*, 86 Am. St. Rep. 107-109; *Manhattan Sav. Inst. v. New York etc. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PARKER v. OTIS.

[130 Cal. 322, 62 Pac. 571, 927.]

PRINCIPAL—Right of to Recover Moneys Paid by Agent on an Unlawful Contract.—Under the provisions of the constitution of California, declaring all sales of shares of the capital stock of corporations on margins to be delivered at a future day to be void, and that any money paid on such contracts may be recovered by the party paying it, a principal may recover moneys so paid for him by an agent. (p. 58.)

PRINCIPAL AND AGENT—Moneys Received on Unlawful Contracts with an Agent, by Persons not Knowing Him to be Acting for Another.—Where a principal seeks to recover moneys paid on an unlawful contract for the sale of stock on margins to be delivered in the future, it is not material that the brokers who received the money and resisted recovery did not know that the person with whom they contracted and from whom they received the money was acting as agent for the plaintiff. (p. 59.)

CORPORATIONS—Evidence of Sales of Stock of, What Sufficient.—Where an action is to recover moneys on the sales of stock in corporations, on a margin, the fact that there is no direct evidence of the existence of any corporation, or that the stocks mentioned in the complaint were shares of the capital stock thereof, will not defeat the plaintiff's right to recover, if it appears that moneys were paid to the defendants for the purchase of "stocks," that stocks were purchased by the defendants in the Pacific Stock Exchange, that in statements rendered by the defendants they referred to and designated certain stocks by name, and that, in a written agreement, it was stipulated that defendants would act as brokers and agents for the purchase and sale of stocks and bonds of their principal. (p. 60.)

CONSTITUTIONAL LAW—Stocks, Purchase of on Margin, Provisions Declaring Invalid.—The provision of the constitution of California declaring that all contracts for the sale of shares of the capital stock of any corporation or association on margin to be delivered at a future day shall be void, and any money paid on such

contracts may be recovered by the party paying it, does not conflict with section 1 of the fourteenth amendment to the constitution of the United States. (p. 61.)

CORPORATIONS—Purchase of Stock on Margin, What is.—The payment to brokers of certain moneys, accompanied by an order to purchase certain stocks, their subsequent purchase in the stock board at the full market price by such brokers, they crediting the parties furnishing the money with the amount thereof, which was always less than the purchase price, and by agreement holding the stocks as security for their commissions, advances, and for accumulated interest thereon, with power to sell the stocks to protect themselves against a decline in value, they not keeping the particular stocks purchased, but always having on hand others of like character of which they could and would have delivered a like number of shares on demand, on payment of the balance due, is a purchasing of stocks on margins. (p. 62.)

JURY TRIAL.—A Court Does not Invade the Province of the Jury when, on a suggestion as to the admission that certain witnesses would testify to certain facts, it states that such admission tends to support plaintiff's theory rather than defendants', if such be the result as a matter of law. (p. 62.)

APPELLATE PROCEDURE—Immaterial Error.—Though the court, on the trial of a cause decided by a jury, erred in not striking out an answer made by a witness, and also in overruling an objection to a question asked, the errors must be regarded as immaterial on appeal, if the facts involved were otherwise fully stated during the examination of the witnesses. (p. 63.)

JURY TRIAL.—An Error of the Court in Reading to the Jury the Whole of a Section of the Constitution, on which plaintiff relied for a recovery, when part only related to the question to be decided, does not entitle the defendant to a reversal. (p. 63.)

INTEREST from the Commencement of an Action to the Recovery of Judgment Cannot be Allowed in an action to recover moneys paid to purchase stocks on a margin. (p. 64.)

STATUTE OF LIMITATIONS.—An Action to Recover Moneys Paid for the Purchase Price of Stocks on a Margin is not for a penalty or forfeiture; but an action for moneys had and received, and subject to the provisions of the statute of limitations governing those actions, and not to those applying to actions upon a statute for the recovery of money or forfeiture, though the right of recovery is conferred only by the provision of the state constitution. (p. 64.)

Deal, Tauszky & Wells, for the appellants.

A. Everett Ball, for the respondent.

325 **CHIPMAN, C.** Action to recover four hundred and seventy dollars alleged to have been paid to defendants by plaintiff for the purchase of stocks of mining corporations on margin. The cause was tried by the court sitting with a jury, and plaintiff had the verdict. The appeal is from the judgment and from an order denying defendants' motion for a new trial.

The evidence was that the purchases were all made by plaintiff's sister acting, as is claimed by plaintiff, as his agent, and that he personally had no dealings whatever with defendants and defendants had no knowledge that Miss Parker was acting for plaintiff.

Defendants claim: 1. That the money paid by plaintiff's sister was in fact hers and not his, and if there can be any recovery it must be by her alone; and 2. That if the money could be considered plaintiff's, then he attempted to delegate ³²⁶ authority to his sister to engage in an illegal transaction, thus creating an agency which the law will not recognize.

Section 26, article 4, of the constitution provides as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

1. Had the plaintiff personally paid the money he could have recovered it, and we see no reason why the remedy given him by the constitution should be taken away because he employed an agent to pay the money for him. The constitution treats the transactions in question as harmful in their tendency, and because harmful has sought to eradicate the evil not only by declaring the contract void, but also by giving a right of action to recover the money paid under it. Being in *pari delicto*, the purchaser of stocks would be left where the law finds him but for the remedy given by the constitution. It would be an exceedingly narrow and an altogether unwarranted construction of the constitution to hold literally to the words of that instrument—that the money may be recovered only "by the party paying it"; i. e., by the particular person who handed over the money to the seller or in whose name the business might happen to be conducted.

In *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393, it was said: "To give effect to the constitution it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." Upon appellants' construction it would be a simple matter to evade the law by interposing an agent of an undisclosed principal to carry on the business with the broker.

In *Cashman v. Root*, 89 Cal. 373, 23 Am. St. Rep. 482, 26 Pac. 883, it was urged that the broker was the agent of his customer, and that he was not liable for that reason. The court held him liable as the instrument through which the illegal end

was accomplished, and he being privy to the design the same result would follow as if he were the seller; and it was said: "The end attained, and not the form of the transaction, must determine the question."

³²⁷ Defendants are presumed to have known that they were receiving money which could be recovered by its owner if he chose to assert his right; it was immaterial, therefore, whether or not they knew who was the principal for whom Miss Parker was acting. Ordinarily, where an agent acts for an undisclosed principal, either the agent or the principal may sue; and while it is true that one cannot delegate authority to do an illegal act, the cause of action here does not depend on the validity of the agency created by plaintiff, but it rests on the provisions of the constitution which made the transaction void and gave a right to recover the money paid.

2. There is evidence tending to show that plaintiff's sister was acting as his agent in paying the money to defendants; he so testified directly. The cross-examination of Miss Parker gives some ground for doubt as to whether she was acting for herself or for her brother, and would perhaps have justified the jury in finding that the money paid by her to defendants had been given to her by plaintiff and became her own and was hers when paid on account of the stock purchases. But there was evidence supporting the view taken by the jury, and we are not permitted to interfere with its conclusion.

3. The unverified complaint alleges that "defendants heretofore, and within two years last past, contracted with plaintiff to buy and sell mining stocks, portions of the capital stock of certain mining corporations, for plaintiff on a margin to be furnished by said plaintiff," etc. The answer is a general denial and puts in issue the above averment.

There is no direct evidence that there existed a corporation or corporations and that the stocks mentioned in the complaint were shares of the capital stock of such corporation or corporations. This was urged as ground for defendants' motion for nonsuit, and the denial of the motion was assigned as error; and was also specified as one of the particulars in which the evidence is insufficient to support the verdict. The evidence was that the money paid to defendants was for the purchase of "stocks"; and witnesses speak of certificates of stock for a certain number of shares which were purchased in the Pacific Stock Exchange by defendants. A statement of defendants' transactions with Miss Parker was furnished by defendants; in this

328 statement some of the same stocks referred to by plaintiff's witnesses are enumerated, and in it appears the amount of money paid at certain dates, with a description of the stocks as follows: "200 Kentuck," "100 Potosi," "100 Yellow Jacket," "50 Challenge," and the like. In the written contracts between the parties defendants say: "We will act as agents and brokers in the purchase and sale of stocks and bonds for our principals," etc.

Webster gives the following definition of the word "stocks": "Property consisting of shares in joint stock companies." In Anderson's Law Dictionary the following definition is given: "The capital of an incorporated company in transferable shares of a specified amount." We think it reasonably clear that the stocks referred to by the witnesses and in the written contracts of the parties were stocks in the sense of the above definition and were shares of incorporated companies.

4. Defendants contend that our constitutional provision is in conflict with section 1 of the fourteenth amendment to the federal constitution, in abridging the privileges and immunities of citizens of the United States and depriving persons of liberty and property without due process of law, and denying persons making margin contracts the equal protection of the laws; that it interferes with the freedom of contract, and is beyond the police power of the state, inasmuch as it is not confined to mere gaming contracts or contracts for the payment of differences, but prohibits legitimate business transactions. This defense was specially pleaded in the answer and was urged on the motion for nonsuit, and was assigned as one of the particulars wherein the verdict is against law.

Chief Justice Shaw, in defining the police power of the state, said: "All property in this commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient": *Commonwealth v. Tewksbury*, 329 11 Met. 55. In *Cashman v. Root*, 89 Cal. 313, 23 Am. St. Rep. 482, 26 Pac. 883, reference was made to the causes "which led to the adoption of the constitutional provision in question. It was pointed out that a large part of the

community had been set wild by stock speculations, and that "the rapid fluctuations of stock afforded unusual inducement to stock gambling," and it was said: "By skillful manipulation of the markets a few fortunate ones had been able to take advantage of the existing mania and made large fortunes for themselves, at the cost of widespread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time through these very purchases on margin. Of these matters this court will take judicial notice, and, in doing so, cannot doubt that this inhibition was intended to strike down this practice." This class of speculative investments must be conceded to possess some of the elements of gaming or gambling contracts, and while it may be that but for the constitutional provision they would not be held void, or, if held void, that the law would furnish no relief to parties in *pari delicto*, still their actual as well as possible injurious effect upon the community and its welfare we think clearly brings them within the police power of the state to regulate or prohibit. For a discussion of the police power of the state, see Judge Sander-son's opinion in *Ex parte Smith*, 38 Cal. 702; also Cooley's Constitutional Limitations, 707. Laws in several states of the Union have been enacted to accomplish the same result aimed at by our fundamental law, and, so far as we are advised, have never been successfully attacked as in conflict with the federal constitution: See statutes of several states referred to in Cook on Stock and Stockholders, sec. 342. See, also, History of Stock Jobbing Acts, c. 8; Dos Passos on Stock Brokers, ed. 1882, p. 382.

If the provision in question on its face fails to distinguish between bona fide contracts and gambling contracts, as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the constitution: *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362; *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393. The court will always see that legitimate business transactions are not brought under the ban.

330 5. It is claimed that the facts in this case do not bring it within the constitutional condemnation. Briefly, the transactions were as follows: Plaintiff paid to defendants certain money, accompanied by an order to purchase certain stocks; defendants went into the stock board, bought and paid for those stocks in full at the market rate; defendants then credited plaintiff with the money paid by him (which was always less

than the amount paid for the stocks by defendants, or, in other words, was but a margin of the cost), and by agreement held the stocks as security for their commissions, advances, and for the accumulating interest thereon, with the power to sell the stocks to protect themselves against a decline in value; defendants did not keep the particular stocks purchased, but had others of like character, and could and would have delivered a like number of shares to plaintiff upon full payment of all balances due at any time upon demand; defendants acted only as agents of plaintiff and had no interest in the stocks beyond their commissions, advances, and the agreed interest. So far as we can perceive, the deal was similar to that in the cases heretofore passed upon by this court and held to be within the provisions of the constitution: See *Sheehy v. Shinn*, 103 Cal. 325, 37 Pac. 393, and cases there referred to; *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362.

6. It is contended that the court invaded the province of the jury in remarking, as to an admission that defendants' witnesses would testify to certain facts, as follows: "The admission tends to support plaintiff's theory of the case rather than defendants'." It is urged that the remark was prejudicial, particularly in view of an instruction asked by defendants, and refused by the court, to the effect that whether the transactions in question are in contravention of the constitution is a question of fact to be determined by the jury from all the circumstances (citing *Kullman v. Simmens*, 104 Cal. 595, 38 Pac. 362); whereas the court told the jury that it is a question of "mixed law and fact." The court instructed the jury that they were "to apply to that evidence these instructions [the instructions previously given] as to the law." The admission referred to presented the question as to whether the facts as admitted constituted a "margin" contract, and this was purely a question of law. The court in its remark assumed the facts to be as admitted, and so left them with the jury, but it ³³¹ intimated, as it later on properly instructed the jury, that as matter of law the facts supported plaintiff; and in this we think the court did not err, and the remark could not have prejudiced defendants' case.

7. When Miss Parker was testifying for plaintiff counsel asked her: "Do you owe Otis & Co. any money?" Defendants' objection was overruled and the witness answered: "Yes, on a margin proposition." Defendants moved to strike out the latter part of the answer as not responsive to the question and as

being a conclusion. The court overruled an objection to the following question asked plaintiff: "Did you delegate authority to your sister to act as your agent and to purchase or deal in stocks on the market with any broker?" The motion in the one case should have been granted and the objection in the other should have been sustained. A witness should be confined to facts, leaving conclusions to be drawn from these facts to the jury or court. The defendants, however, were not injured, because the facts were fully stated during the examination of the witnesses, and the jury could and no doubt did draw its own conclusions from these facts under the instructions of the court as to what constituted margin contracts.

8. Error is claimed because the court, in its instructions, read to the jury the whole of section 26, article 4, of the constitution, the first part of which relates to lotteries and gift enterprises. It was not necessary to the case to read more than the latter part of the section, but reading all of it could not have been prejudicial to defendants. Error is claimed in refusing to give certain instructions asked by defendants, or in modifying them as given.

We have carefully examined these offered instructions and find that such of them as were essential to a proper presentation of the issues to the jury were given as asked or with such modifications as fairly placed the matters in controversy before the jury. Those which were refused were not such as could enlighten the jury or aid them in reaching a right conclusion. For example, it could not have injured defendants by refusing to tell the jury that plaintiff "is entitled to no sympathy from you"—the court, however, did tell them that "there are no equities between these parties, and their rights are to be determined 332 by the strict rules of law," and this was about equivalent to telling them that neither party was entitled to their sympathy. Again, defendants cannot complain because the court refused to tell the jury "that it is never to be presumed that parties deliberately enter into contract in violation of the constitution." The court very clearly pointed out to the jury that they must find for the defendants unless they should find from the preponderance of the evidence that the transactions in question were margin transactions within the meaning of the constitution as the court had declared that meaning. The instructions as given were a remarkably clear exposition of the law, and the jury were repeatedly cautioned as to its application

to the facts and as to the rules which should govern them in judging of the facts. We see no prejudicial error in giving or refusing any instructions.

9. There remains but one question undisposed of. The court instructed the jury to allow interest from the commencement of the action, and this is urged as error. We think the question is settled by the decision in *Baldwin v. Zadig*, 104 Cal. 594, 34 Pac. 363, 722.

It is advised that the judgment be modified by striking therefrom the amount allowed for interest, and thus modified that the judgment and order be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the amount allowed for interest, and, thus modified, the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

On petition for rehearing, the court, in Bank, rendered the following additional opinion, which was dated November 26, 1900, and filed November 27, 1900:

The COURT. A point overlooked in the commissioner's opinion is the defense of the statute of limitations. The claim is that subdivision 1, section 340, of the Code of Civil Procedure applies, because this is an action upon a statute for a penalty or forfeiture, and, if so, must have been commenced within one year.

333 What is meant by a statutory penalty was defined in *Los Angeles v. Ballerino*, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329, to be "one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong. The action to recover such a penalty is a penal action founded upon a statute, and is the action which, under section 340 of the Code of Civil Procedure, must be brought within one year."

There is nothing penal in the constitutional provision; it is simply remedial. The action is for money had and received, and recovery cannot be had except after demand and refusal: *Baldwin v. Zadig*, 104 Cal. 594, 34 Pac. 362, 722. But for the constitution there could be no recovery. If the constitution, in effect, makes the margin sales of stock unlawful, it does not

follow that the action given to recover the money paid for the purchase of such stock is a penal action, or is for the recovery of a penalty, and certainly the recovery cannot be said to be "without reference to the actual damage sustained." for there is no damage except as measured by the money paid.

Rehearing denied.

A Writ of Error was Prosecuted to the supreme court of the United States, where the judgment was affirmed (see *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 169), and the court, in an opinion delivered by Mr. Justice Holmes, said:

"This is an action in three counts, for money had and received, for money paid and promised to be repaid, and for margins paid to the defendants as stock brokers on contracts to buy and sell mining stocks, respectively. The answers to the first two counts are general denials and other matters now immaterial. The answer to the third count, beside a general denial, sets up that the count is based upon a provision in article 4, section 26, of the constitution of California, and that that provision is contrary to the first section of the fourteenth amendment of the constitution of the United States. It appears by the record that the only cause of action was that stated specifically in the third count, and that the defendants interposed the constitutional objection at the trial, and that it was overruled. The plaintiff had a general verdict on all three counts. The case was taken from the superior to the supreme court of California, on appeal, and the judgment of the superior court was affirmed, with an immaterial modification. It now is brought here by a writ of error to the supreme court of the state.

"We must take it as established that the plaintiff did enter into transactions prohibited by the constitution of California, and that he had a right to his judgment under that constitution if the clause relied upon is not contrary to the constitution of the United States. There is no question that the parties were subject to the provisions of the latter constitution, and no doubt that the question whether it invalidated the state constitution necessarily was passed upon, and was answered in the negative by the state court: *Parker v. Otis*, 130 Cal. 322, 62 Pac. 571, 927.

"The provision of the state constitution is as follows: 'All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.' There was some suggestion that these words might be narrowed by construction to contracts not contemplating a bona fide acquisition of the stock, but intended to cover only a wager or con-

templated settlement of differences. Of course, if they were construed in that sense there would be no doubt of their validity: *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425. But while the supreme court of California says in this case that it 'will always see that legitimate business transactions are not brought under the ban,' in the same sentence it leaves open the hypothesis that the provision 'fails to distinguish between bona fide contracts and gambling contracts,' and sustains it as a proper police regulation, even if it does fail as supposed. Therefore, it may be held hereafter that ordinary contracts for the sale of stocks on margin are not legitimate transactions, and it would not be safe for us to take the words in any other than their literal meaning, or to assume in advance of a decision that they will be taken in a narrow sense. In this case the jury were instructed broadly to find for the plaintiff if he had paid any money to the defendants as a margin for the purchase of stock of a corporation, and this instruction was sustained.

"The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the fourteenth amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.

"It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts: *Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. Rep. 499. But general propositions do not carry us far. While the courts must exercise judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.

"Even if the provision before us should seem to us not to have

been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law': *Booth v. Illinois*, 184 U. S. 425, 429, 22 Sup. Ct. Rep. 425, 427. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws no doubt would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized states: See *Ballock v. State*, 73 Md. 1, 20 Atl. 184.

'We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagree with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But, if he buys stocks on margin, he may put all his property into the venture, and, being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be, and frequently are, used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted, the whole people were buying mining stocks in this way, with the result of infinite disaster: *Cashman v. Root*, 89 Cal. 373, 382, 383, 23 Am. St. Rep. 482, 26 Pac. 883. If at that time the provision of the constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the constitution showed, as we have said, the conviction of the people at large that

prohibition was a proper means of stopping the evil. And, as was said with regard to a prohibition of option contracts, in *Booth v. Illinois*, 184 U. S. 425, 431, 627, 22 Sup. Ct. Rep. 425, we are unwilling to declare the judgment to have been wholly without foundation.

"With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations.' California is a mining state, and mines offer the most striking temptations to people in a hurry to get rich.' Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 549, 22 Sup. Ct. Rep. 431. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws.

"Judgment affirmed.

"Mr. Justice Brower and Mr. Justice Peckham dissented."

FISHER v. McINERNEY.

[137 Cal. 28, 69 Pac. 622, 907.]

EXECUTION SALE to Attorney of Defendant—Presumption as to Furnishing of Moneys.—If, after a sale of property under execution, the attorney of the defendant, with his consent, takes an assignment of the certificate of sale, no presumption arises that the consideration of the assignment was not furnished by the attorney. (p. 72.)

EXECUTION SALE to the Attorney of the Defendant is not Unlawful if made in good faith, with the consent of his client, and without any purpose of defrauding the latter's creditors. (p. 74.)

EXECUTION SALE.—No Presumption Arises on the Purchase of Property under Execution by the Defendant's Attorney that the purchase was made for the benefit of the client or with his funds. (p. 75.)

T. Z. Blakeman and Rothschild & Ach. for the appellant.

Tevlin & Humphreys, James F. Tevlin, and Thomas E. Curran, for the respondents.

²⁸ CHIPMAN, C. Statement of facts: Plaintiff brought the action in the superior court of the city and county of San Francisco against Thomas McInerney, M. C. Hassett, and others to have certain conveyances set aside and the property subjected to the payment of a judgment in favor of plaintiff against McInerney. Nicol and Goettinger, judgment creditors of McInerney, intervened and sought similar relief to that asked in the complaint and on similar grounds. Plaintiff and interveners were nonsuited at the trial, and now appeal from the judgment and from the order denying motion for a new trial.

²⁹ The property was acquired prior to 1884 by Thomas Moran and Thomas McInerney as copartners; the partnership was dissolved July 6, 1884, and Moran began an action that day in the above-named court for an accounting and division of the partnership property, which action is still pending; judgment was entered settling the partnership accounts, showing a balance due Moran; findings were made and both parties moved for a new trial, and these motions are now pending. On McInerney's motion in that action defendant Charles C. Fisher was appointed receiver of the partnership property, January 3, 1895. Plaintiff's judgment against McInerney for \$1,542 and costs was docketed January 25, 1893, and became a lien on whatever interest the latter had in the real estate described in the complaint, being certain eighteen described lots in the city and county of San Francisco, which interest, it is alleged in the complaint, was an undivided one-half. On July, 1894, plaintiff herein caused execution to issue on his judgment, and levied on the interest of McInerney in said property, which was advertised to be sold January 10, 1895, but on January 4, 1895, on motion of McInerney, in Moran v. McInerney, the court made an order restraining the sheriff from selling; permission was granted in the latter case to sue the receiver for the purposes of this present action.

One Cresswell obtained judgment against McInerney for \$1,268.19 and costs, October 7, 1889. In that action Hassett was attorney for McInerney. Execution issued, and on November 25, 1891, the sheriff sold several pieces of the property, "some to J. J. Brady and some to J. J. Rauer for the sum of \$1,569.12," and certificates of sale were delivered to the several purchasers, and February 3, 1892, the sheriff returned execution fully satisfied, the land sold "being portions

of the land described in the complaint herein," but the particular pieces are not shown.

November 23, 1891, Rauer had judgment against McInerney for \$228 and costs, and Hassett was McInerney's attorney therein. Execution issued and returned satisfied March 7, 1892, by sale of several parcels of the land in question for \$306.50 to Rauer, and one parcel to H. Kroger for \$140, but what parcels these were does not appear.

The certificates of purchase in *Creswell v. McInerney* were assigned to Hassett prior to plaintiff's judgment—viz., by Brady, May 21, 1892, for \$1,523.06, and by Rauer, the same day, for \$230.25—and on February 19, 1894, Hassett transferred these certificates to William J. Gleason. On September 1, 1892, prior to plaintiff's lien, Rauer assigned his judgment against McInerney to Hassett, and on February 19, 1894, Hassett transferred the judgment to Gleason. May 11, 1894, the sheriff made three deeds to Gleason, conveying the lots described in the above-mentioned certificates (description of lots not shown). On the same day Gleason conveyed the lots thus deeded to him to Hassett, and the sheriff's deed to Gleason and Gleason's to Hassett were recorded by request of Hassett January 22, 1895. On November 15, 1894, Hassett conveyed by deed to defendant John Grant all the property described in the complaint, as a mortgage to secure his note for \$2,500, given to Matthew Nunan. It does not appear what became of the parcel sold to Kroger. It appears that on April 13, 1892, prior to plaintiff's lien, McInerney made a trust deed to M. Farrell and J. Stutz, acknowledged April 30, 1892, and recorded at request of Farrell July 1, 1893, conveying all the property described in the complaint in trust—1. To sell the same, and pay all charges and liens against the land; 2. To mortgage the land for like purposes; and 3. To lease the land.

Plaintiff alleges in his complaint that McInerney redeemed in due time from the *Creswell* execution sale, and that Hassett, with McInerney's consent, procured the holders of the sheriff's certificates to assign them to Hassett to hold for the use and benefit of McInerney, and with intent to hinder and delay plaintiff and other creditors, at which time it is alleged that Hassett was, and now is, McInerney's attorney in *Moran v. McInerney*, and also in the *Creswell* and other suits against McInerney. It is also alleged that Hassett, with McInerney's consent, assigned all of said sheriff's certificates (except a certificate for parcel 3) to Gleason, without any consideration,

and that Hassett on February 20, 1894, with the consent of McInerney, caused the sheriff to make a deed to Gleason of the property embraced in said certificates, and on the same day procured Gleason, with the consent of McInerney, to convey by deed all said property described in said certificates to himself (Hassett) without consideration.

31 The fact of Hassett being McInerney's attorney is admitted, but the answer denied the allegations of the complaint as to the purpose of Hassett in obtaining the assignments and deeds as alleged, and denied that it was for the benefit of McInerney, and there is no allegation that Hassett took the assignments with intent to hinder creditors. There is nothing to show any redemption of McInerney, the record showing only the assignment of the certificates to Hassett shortly before the time for redemption expired, followed by sheriff's deeds, as stated above, a consideration therefor as paid by Hassett being named in the assignments. Like allegations are made as to the deed to Grant. It was also alleged in the complaint that McInerney owned no real property not exempt other than that described in the complaint; that he was insolvent when the execution sales were made, and is now insolvent. The answer admits plaintiff's judgment, but denies that it is a lien on the property; denies that in obtaining the assignments of the sheriff's certificates Hassett acted as McInerney's attorney, or that he has since acted as his attorney, but that he has been acting as attorney in Moran v. McInerney in his own interest; denies that he conveyed to Grant otherwise than by way of mortgage to secure the promissory note referred to in the deed; denies specifically allegations of fraud or intent to defraud creditors in any of said transfers.

The judgment-roll in Moran v. McInerney was introduced. In addition to some facts already stated, it appeared by that judgment-roll that in that action Moran filed a third supplemental complaint, alleging that since the interlocutory decree settling the accounts of Moran and McInerney Hassett acquired and now claims some interest in the property; that he had notice of the pendency of the suit prior to his obtaining said interest, and asked that he be made a party. Hassett answered, admitting that he claimed an interest in the property, admitted notice of the pendency of the action, but denied that he acquired the property for the benefit of McInerney, and alleges that he acquired it free from any trust or claim of any person. On the motion in Moran v. McInerney to

restrain the sheriff from selling under execution in *Fisher v. McInerney*, McInerney filed an affidavit in which he stated that the attached affidavit of Hassett is true and correct; that it is affiant's desire that the sheriff, Fisher, Blakeman, ³² and Moran be enjoined from selling the land mentioned in the complaint; that "he has no desire to obstruct the payment of his creditors; and that if it shall appear upon the final settlement of said copartnership that he has sufficient interest in the funds that may accrue therefrom," he is willing the judgment of plaintiff, Fisher, "shall be paid out of said fund." The affidavit of Hassett, referred to, stated that he "has an interest as owner of certain portions of the real estate described in the complaint herein; . . . that there is a certain indebtedness due from the plaintiff and the defendant McInerney on account of the copartnership set forth in the complaint to one G. W. Burnett, amounting to \$3,500, one of the defendants herein; that there is a large amount of judgment liens against the said property for street assessments due by said copartnership; that Jacob Stutz and Michael Farrell have received a conveyance of all the partnership property from Thomas McInerney in trust, to sell the same to pay off the indebtedness due from McInerney to his creditors; that by reason of the refusal of plaintiff to join in any conveyance, the said trustees have been unable to sell any portion of said property or to discharge any obligation due from McInerney to his creditors." Some other facts, not material to be stated, were set forth. There was introduced in evidence a deed from Hassett to Grant, November 15, 1891, in form, grant, bargain, and sale, and embraced all the property described in the complaint in the present action and contained a clause that the conveyance was by way of mortgage to secure a promissory note for \$2,500 of even date made by Hassett to Matthew Nunan.

It was admitted that at the date of the sheriff's sale under execution in *Cresswell v. McInerney*, McInerney was the owner of at least an undivided one-half of all the property described in the complaint, subject to judgment liens and encumbrances appearing to have existed at the time stated, and subject to final determination as to his rights in *Moran v. McInerney*. The Nicol and Goettinger judgments were obtained in 1895, and no executions ever issued on them. Other facts appear in the opinion.

Appellants rest their appeal principally upon the proposition that an attorney for a claimant to real estate pending

litigation concerning the client's interest in said real estate ³³ cannot acquire ownership thereof pending such litigation as against the client or as against the judgment creditors of said client; and that the creditors of the client are entitled to make the same objection to the attorney acquiring an interest therein as the client himself could make. It is further contended that the evidence showed that McInerney and Hassett have since the assignment of the sheriff's certificates and the making of the sheriff's deeds admitted an interest remaining in said property in the defendant McInerney. In support of their principal proposition appellants cite Weeks on Attorneys at Law, 2d ed., sec. 277, and cases in footnotes; 1 Bigelow on Frauds, 281, and cases cited in note to Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 788; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Broder v. Conklin, 121 Cal. 282, 53 Pac. 699.

This court said in Cox v. Delmas, 99 Cal. 104, 33 Pac. 836, that the current of authorities does not go quite so far as the proposition of appellants. We find no case where the extreme view contended for is so nearly supported as in Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572. Some expressions of the court in that case would seem to go to the full extent claimed. But even in that case it appears that the interest purchased by the attorneys "was antagonistic to that of their client." The relation of attorney and client existed at the time the attorneys purchased a tax title to the property, and the action was still pending in which the client was contesting his right to the same property. The court said: "It is contrary to the policy of the law, and also contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position as adviser of his client concerning a pending litigation threatening the title to his property and that of the purchaser of such property, in opposition to the title of his client." The facts do not appear with sufficient fullness to justify the claim that the rule of law now contended for was necessarily involved. If it had appeared in the case at bar that McInerney procured Hassett to purchase the sheriff's certificates of sale with intent to defraud the creditors of McInerney, and that it was Hassett's intention to hold the title ³⁴ for the benefit of McInerney, we would have a case quite different from the one now here. There is no evidence of any

such mutual intent or any such intent on the part of either Melnerney or Hassett. Plaintiff alleged that Melnerney was insolvent when Hassett purchased the certificates. Melnerney could have redeemed after Hassett took the assignments as well as before, if he had the means. But he had not the ability to do so, and the complaint alleges that it was with his consent and knowledge that Hassett purchased the certificates of sale, and he stated in his affidavit that it was true, as deposed by Hassett, that the latter "has an interest as owner of certain portions of the real estate described in the complaint herein." There is nothing in the case to show that Hassett purchased adversely to his client; on the contrary, plaintiff alleged, and the client affirmed, that it was with the client's consent. But appellants contend that "the presumption is, that the consideration recited for the original transfers of the sheriff's certificates to Hassett was paid by his client," and that because the assignments were made near the last day for redemption, and for a consideration coinciding closely with the amount necessary to redeem, "the presumption is, . . . that the transaction amounted to redemption by the client." In short, it must be presumed that the client furnished the money for the purpose of redeeming the property. There being no evidence aside from the mere relation of attorney and client that there was fraud in the transaction, appellants find themselves compelled to fall back on these presumptions. "A presumption is a deduction which the law expressly directs to be made from particular acts": Code Civ. Proc., sec. 1959. And, as we have seen, the fact from which appellants make their deductions is the fiduciary relation between the assignee of the certificates and the judgment debtor. We do not think the relation of attorney and client alone justifies the presumptions or deductions relied on. There was nothing unlawful in the purchase by Hassett made in good faith, and with consent of his client, and we do not see how it could be presumed to be in effect a redemption by the client; nor can we see how any presumption would arise that the client furnished the money to redeem and with intent to defraud creditors. The transaction being lawful, it seems to us that the presumption would rather be that the transaction ³⁵ was fair and regular as between attorney and client: Code Civ. Proc., sec. 1963, subd. 19. Viewing the case from the standpoint of the attorney's power to bind his client by reason of his relation, it has been held, and we think cor-

rectly, that he has no authority to buy for his client property sold under execution, nor is it the duty of an attorney to do so, and certainly in the present case Hassett owed no duty to his client's creditors simply because he was McInerney's attorney: *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386, and notes; *Savery v. Sypher*, 6 Wall. 157; *Maynard's Case*, 1 Walk. 472; *Washington v. Johnson*, 7 Humph. (Tenn.) 468. Neither was McInerney called upon to redeem, even if he had other assets with which to do so; it was optional with him whether he redeemed from the execution purchasers or their assignees.

It was essential that the complaint should allege either that the debtor was the purchaser or that Hassett purchased for his benefit, or facts should be alleged showing a fraudulent purchase as to creditors. There is no evidence that McInerney, the debtor, was the purchaser; nor is there any evidence that Hassett purchased for him, except such inference as may be drawn from the relation of client and attorney. If there were facts which would make the purchase fraudulent as to creditors, they should be alleged and proved. Mr. Bump says there is a clear distinction between a fraud upon the debtor and a fraud upon creditors. In the one case he is the victim, and in the other he is either in fact or in law the perpetrator, in which latter case the creditors seeking to avoid a sale do not represent the debtor, but exercise rights paramount to his. "In the former case," says the author, "the remedy belongs to the debtor alone, and they [the creditors] cannot interfere when they are not in contemplation of the author of the wrong, and are only affected consequently": *Bump on Fraudulent Conveyances*, sec. 20. The claim that Hassett purchased with intent to defraud or hinder McInerney's creditors finds no support whatever in the evidence, unless it may be inferred from the single fact that Hassett was McInerney's attorney at the time, and this we think wholly insufficient to put defendants upon their proofs.

As to defendant Grant, there is a total failure of proof. It is alleged that Hassett conveyed to him without consideration, ³⁶ and that Grant took with notice of all the facts alleged in the complaint. There is no evidence that Grant took with notice, and there is evidence that the deed to him was as a mortgage to secure a debt of \$2,500.

It is claimed that both Hassett and McInerney admitted that the latter had an interest in the property subsequent to the

assignments. We do not think the evidence so shows. The affidavits of McInerney and Hassett, relied on by appellants as so showing, do not bear them out.

There is some oral evidence, not very definite, as to the value of various parcels; but this evidence is all given on the assumption of clear title, free from encumbrances, and that unless free the property could not be sold at all. In view of the pending litigation affecting the property and McInerney's interest therein, it cannot be said that the price paid was inadequate or that there was gross disparity between the amount necessary to redeem and the value of the property.

The judgment and order should be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 11th of August, 1902:

BEATTY, C. J., dissenting. The vital question involved in this case is somewhat obscured by the complicated transactions out of which the litigation arises. Devested of those extraneous and unessential features the case may be thus stated:

The real property of a judgment debtor is sold under execution. Before the time for redemption has elapsed his attorney takes an assignment of the certificate of sale from the purchaser at the execution sale. The consideration for the transfer is the amount required for redemption—a small fraction of the value of the property. There being no evidence ³⁷ on the point, the presumption is, that, even if the attorney paid his own money for the assignment, he did so without the consent of his client, and that he holds the title as an involuntary trustee for his client, with at most a lien for the sum expended in procuring the transfer. The question, then, is whether another judgment creditor of the client can subject his equitable estate in the land to the payment of his judgment. It is held that he cannot—that the right of the client to enforce his equity against his trustee is a purely personal right which he may waive if he chooses so to do, and that his valuable interest in the land

is at his option placed beyond the reach of an honest creditor. From this conclusion I dissent. I think, on the contrary, that the creditor has the right to proceed in his own behalf, as well against this estate as against any other valuable property of his debtor.

The Purchase by Attorney of property at a judicial sale, and the effect and validity thereof are considered in *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670, 76 N. W. 433; *Cunningham v. Jones*, 37 Kan. 477, 1 Am. St. Rep. 257, 15 Pac. 572; *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386. In case of a purchase of the subject matter in litigation during the pendency of the suit by an attorney of his client, the transaction is presumably fraudulent: *Elmore v. Johnson*, 143 Ill. 513, 36 Am. St. Rep. 401, 32 N. E. 413.

FISHER v. FEIGE.

[137 Cal. 39, 69 Pac. 618.]

LEGAL ACT from Spiteful Motives.—No use of property which would be legal if due to a proper motive can become illegal because prompted by an improper or malicious motive. (p. 79.)

RIPARIAN OWNERS — Right of to Cut Trees, Though the Water in a Stream is Thereby Lessened.—The cutting of trees by a riparian owner on his own land is a legal act, and cannot be enjoined because it lets in the sun, causes greater evaporation, and thereby lessens the amount of water which would otherwise flow upon the lands of the lower proprietor. (p. 80.)

A RIPARIAN OWNER has the Right to Build a Dam Across a Stream if he does not thereby appreciably diminish the amount of water which naturally flows to the lands of his neighbor below. (p. 80.)

WATER—Right of a Riparian Owner to Restrict the Use of by Another.—One riparian owner is not entitled to an injunction restricting the other to the use of so much of the waters of a stream as may be necessary for his household and domestic purposes and water for his stock. (p. 80.)

O'Brien, O'Brien & O'Brien, for the appellants.

T. B. Hutchinson and F. E. Johnston, for the respondents.

⁴⁰ **McFARLAND, J.** This is an appeal by defendants from a judgment in favor of plaintiff.

The plaintiff is a lower riparian proprietor on a certain watercourse, and defendants are upper riparian proprietors thereon. The action was brought to recover damages in the

sum of five thousand dollars for certain alleged interferences by defendants with the flow of the water in the stream, and for a perpetual injunction restraining defendants from their repetition of the alleged wrongs. The court found that plaintiff was damaged in the sum of one cent by the alleged wrongs, for which amount judgment was rendered and by the judgment defendants were also perpetually enjoined from doing certain acts. Defendants appealed from the judgment.

It is quite clear that the judgment, as it stands, cannot be rightfully affirmed. There is no averment or finding that defendants have diverted any water from the stream. It is averred that along and adjacent to the stream as it flows through defendant's land there is a heavy growth of timber, which, before the alleged wrongful acts of defendants, protected ⁴¹ the waters of the stream from evaporation by drying winds and the rays of the sun, and that defendants have cut and felled a large number of trees, and thus let in the sun and the wind and caused the waters to be diminished by evaporation, so that not so much flowed down onto plaintiff's land as formerly; and that they threatened to fell more of said trees in the future. It is also averred that defendants have erected certain dams or embankments across the stream by which the waters have been prevented from flowing down the channel of said stream "as they have been accustomed to flow," and from flowing into and upon the land of plaintiff, "as they otherwise would have flowed." It is also averred that defendants caused about ten trees to be felled into said stream, and allowed them to remain there, and that this rendered the waters unpalatable and unwholesome. It is also averred that defendants' land is wild and untilled, and is not susceptible to cultivation. The foregoing constitute the main averments upon which plaintiff bases his prayer for damages and injunction—it being averred that defendants threaten to continue the said acts. It is also averred, and found by the court, that said acts were done by defendants "solely for the purpose of injuring the plaintiff and damaging his said property, and out of spite and ill-will toward the plaintiff."

As both court and counsel seem to have attached considerable significance to the alleged motive which led defendants to do the acts complained of, it may be proper to briefly notice that subject. In civil cases, of the character of the one at bar, the general rule no doubt is, as stated in *Mayor etc. of Bradford v. Pickles*, [1895] App. Cas. 587, that "no use of prop-

erty which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." But there may be cases where the very question of the legality of an act would depend upon the purpose for which it was done. This is particularly so with respect to the use of water under the law of this state on that subject. For instance, a riparian owner in California has a right to a reasonable use of the water of a natural stream running through his premises for the purpose of irrigating his riparian land; and this includes the incidental right to divert onto his land what, under all the circumstances, would be a reasonable amount of the water, by dams and other necessary appliances. And in an action by a lower against an upper riparian owner ⁴² for diversion of water, the latter could successfully defend by showing that he had only used a reasonable amount of the water to irrigate his land; but there would be no such defense if it appeared that he diverted the water merely to let it run to waste, and did not make, nor intend to make, any beneficial use of it for irrigation, or that he had carried it to nonriparian lands. He could not lawfully, any more than could one claiming merely by appropriation, thus divert the water without applying it to a beneficial use. But in the case at bar there was no diversion; and under the facts found we cannot see how the lawfulness of the acts enjoined can depend upon the motives by which they were done, or may be done in the future.

It is found that the defendants did fell trees on their lands, and threatened to fell more, the effect of which was, and would be, to let in the sun and winds, and thus increase evaporation. It was also found that they had built some dams in the stream by which the waters were prevented from flowing "as they otherwise would have flowed"; but there is no finding that these dams prevented the usual amount of water from reaching plaintiff's land. It was also found that the land of defendants is wild and untilled, and, "for the greater part, is not susceptible of cultivation."

There is also a finding—somewhat obscured by being mixed up with other matters in finding No. 6—that defendants fell some trees in the stream by which the waters were rendered unpalatable and unwholesome, and that they threatened to fell other trees into the stream, there to remain and decay, whereby the waters of said stream will be rendered unfit for medicinal and domestic purposes. The foregoing are substantially the

findings upon which the injunction is based. The injunction is most sweeping in its terms. By the judgment the defendants are "perpetually enjoined and restrained from in any manner obstructing or impeding or hindering the natural flow of the water of that certain stream at any point therein or thereon above the said lands of plaintiff," and also "from cutting or felling the timbers and trees growing in the channel and upon the immediate banks of said stream at any point above the said lands of the plaintiff, whereby the said stream will be exposed to the rays of the sun and the waters thereof lost or materially diminished "by evaporation." They are also enjoined from felling any trees into the stream and allowing them to remain there and decay. No right is preserved to defendants, except to take water for domestic purposes and for stock.

It is evident that very little, if any, of this injunction can be sustained. It is quite apparent that cutting trees upon one's own land is a lawful act, which cannot be restrained because it "lets in the sun" and causes more evaporation; any incidental damage which might come to a lower riparian owner from such lawful act would clearly be *damnum absque injuria*. And, then, a man may build a dam across a stream on his own land, provided that thereby he does not appreciably diminish the amount of water which should naturally flow onto the land of his neighbor below. But, in addition, the judgment in this case perpetually prohibits defendants from ever exercising many of the undoubted rights of riparian owners. They are allowed only to use "so much of the waters of said stream as may be necessary for their household and domestic purposes, and for water for their stock." There is not even any provision for changing conditions. The defendants are perpetually cut off from ever using the water for irrigation, or as motive power, or for fish-ponds, bath-houses, etc., or for ornamental and many other purposes for which a riparian proprietor may, in a measure, control the stream on his own land, if he does not thereby materially diminish its flow onto lands below, or apparently adulterate its quality.

No doubt, the defendants could be enjoined from felling trees into the stream, if thereby the water was made unfit for domestic use; but on that subject the findings should, we think, be more certain and specific. It does not fully appear that the injury thus done to the quality of the water was material; and the finding as to that matter is rather inconsistent with the other finding, that all the damage done by all of the alleged acts

of defendants amounted to only one cent. If there be another trial, there should be a fuller finding on this subject; and also as to whether the dams alleged to have been made by defendants on their own land materially lessened the flow of the water on to the land of plaintiff.

The judgment appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

The Malicious Exercise of a Legal Right seems not to be actionable: See *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; *Bordeaux v. Greene*, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218.

Every Riparian Proprietor has a right to the ordinary use of water naturally flowing past his land for domestic purposes, without regard to the effect of such use upon the lower proprietors. He also has the right to use it for any purpose whatever, provided he does not interfere with the rights of other proprietors. The primary use is for domestic purposes: *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068; *City of Canton v. Shock*, 66 Ohio St. 19, 63 N. E. 600, 90 Am. St. Rep. 557, and cases cited in the cross-reference note thereto. A riparian owner may reasonably detain water by means of a dam for a proper purpose, although the flow is diminished by evaporation and percolation: *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. But an unreasonable detention of the waters will not be tolerated: *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393.

PEOPLE v. McDANIELS.

[137 Cal. 192, 69 Pac. 1006.]

PLEADING a Conviction of a Lesser Offense Involved in a Greater.—To a prosecution for an assault with a deadly weapon with intent to commit murder, the defendant is entitled to plead and prove, as a complete bar, his previous conviction, sentence, and punishment for the crime of battery growing out of the identical facts on which the present prosecution is based. (p. 83.)

Lewis H. Smith and James A. Burns, for the appellant.

Tirey L. Ford, attorney general, A. A. Moore, Jr., deputy attorney general, and O. L. Evarts, district attorney, for the respondent.

192 HAYNES, C. Appellant was tried upon an information for assault with a deadly weapon with intent to commit the crime of murder, and was found guilty and sentenced to four-

teen years' imprisonment in state's prison, and appeals from the judgment and from an order denying his motion for a new trial.

The offense charged in the information is alleged to have been committed on the first day of February, 1901, and the complaint upon which the preliminary examination was had ¹⁹³ was filed with the committing magistrate on February 12, 1901. The defendant was arraigned on March 26th, and on the 28th pleaded not guilty, and also pleaded a former conviction of the offense charged.

In support of his plea of former conviction the defendant offered in evidence the records of a justice of the peace showing, in substance, that on February 10, 1901, Bessie McDaniels (the person upon whom the information in this action charged the assault with intent to murder to have been committed) filed her complaint with said justice, charging the defendant with having committed a battery upon her on said first day of February, 1901; that a warrant was issued thereon, under which he was arrested on the 11th; that he pleaded guilty to the charge of battery, and on the 12th he was sentenced by said justice of the peace to imprisonment in the county jail of Fresno county for the term of one hundred and seventy-five days, and also offered in evidence the commitment issued by the justice upon said judgment; to all of which the district attorney objected upon the ground that it was incompetent, irrelevant, and immaterial. The objection was sustained and the defendant excepted. The defendant then called Mrs. Bessie McDaniels, upon whom the assault charged in the information was alleged to have been committed, and asked whether she was a witness in the justice's court in the battery case prosecuted by her against the defendant. The prosecution's objection was sustained; and the defendant then offered to prove by said witness and by one John Griffin, the only witnesses who testified before the justice in the battery case, that they testified on that trial to the same facts to which they had testified in this case; that the prosecution then announced that they objected to any testimony in regard to the battery case, the objection was sustained, and defendant excepted.

The testimony of said witnesses, who had been called and examined in chief by the prosecution in this case, covered all that appears to have occurred between the defendant and the prosecutrix on said first day of February, and, indeed, other matters occurring both before and after that date.

The court erred in these rulings. Respondent contends that "the offense of battery consists in the use of force or violence upon the person of another, and is a greater offense than ¹⁹⁴ assault, and, being greater, includes the less; but the less—that is, assault—does not include the greater. Battery includes assault, but assault does not include battery."

As said by the learned counsel, battery includes and implies an assault, or there can be no battery without an assault. What the defendant did, therefore, may have constituted a simple assault, or assault and battery, or assault with intent to murder; and the last-named offense may be committed either with or without a battery; but the evidence on the part of the prosecution, given upon this trial, showed an aggravated battery which may or may not have been committed with intent to murder. The prosecution before the justice of the peace was for the same acts of the defendant, but the complaint and judgment omitted the alleged intent to murder charged in the information. The identity of the acts of the defendant in the two cases is not questioned, and the defendant has therefore been convicted of the assault, which is an essential fact to be proven under the information, the intent to murder not being a crime in the absence of some physical act constituting an assault. It is well settled that a conviction of a lower offense embraced in a higher one, for the commission of which a defendant was tried, is an acquittal of the higher offense, and an independent trial and conviction of the lower offense, when pleaded, must, upon the same principle, be a bar to the prosecution for the higher offense which included it. *People v. Defoor*, 100 Cal. 150, 34 Pac. 642, cited by appellant, is in point, and, we think, conclusive. It is not necessary here to cite or quote from the numerous cases there cited.

In *Regina v. Elrington*, 9 Cox. C. C. 86, 90, Cockburn, C. J., said: "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred"; and upon the argument in that case he interrupted counsel for the prosecution, and said: "The case of *Regina v. Stanton*, 5 Cox C. C. 324 is a strong authority against you. There it was held that a conviction for an assault under the statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault charging an assault and wounding with intent to murder."

Upon this subject it is said in Bishop's New Criminal Law

¹⁹⁵ (volume 1, section 1957): "When he has been put in jeopardy for the lowest, then, for example, is prosecuted for the highest, our constitutional guaranty stands in the way of his being convicted a second time for the lowest, for a jeopardy of the highest is equally a jeopardy of the lowest. And since the government confessedly cannot begin with the highest, and then go down step by step bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result."

The respondent cites *People v. Helbing*, 61 Cal. 620. There the defendant was charged by the information with the offense of assault with a deadly weapon with intent to commit bodily injury, and was found guilty of battery. Upon the appeal the judgment was reversed, and a new trial ordered. Defendant then pleaded a former acquittal, and twice in jeopardy for the same offense. He was found guilty as charged in the information, and again appealed. It was then held that battery was not included in the offense charged; that upon trial for an assault with a deadly weapon with intent to commit bodily injury "a defendant could not equally be convicted of battery, and [such conviction] constitutes no bar to a second trial upon the same information." The reason for this conclusion is, that battery is not necessarily included in a charge of an assault with intent to commit bodily injury, and not having been charged in the information, there could be no conviction for battery or the assault which is necessarily included in it. But here the prosecution for battery was an independent one, prosecuted in another tribunal, and was in every respect, so far as appears, regular, authorized, and valid, and therefore operated as a conviction of the assault, which did not follow the conviction for a battery in a case where such conviction was unauthorized.

In *People v. Stephens*, 79 Cal. 428, 21 Pac. 856, the first prosecution was for a libel contained in an article published by the defendant in a newspaper, and that case was a prosecution for a libel contained in the same article published in the same issue of the same paper, and it was held: "The state cannot split up one crime and prosecute it in several parts; nor can a defendant be convicted and punished for two distinct crimes growing out of the same identical act": See, also, numerous ¹⁹⁶ cases there cited; also, *People v. Willard*, 92 Cal. 482, 28 Pac. 585, and *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642.

People v. Bentley, 77 Cal. 7, 11 Am. St. Rep. 225, and note; 18 Pac. 799, appears, from the meager statement of facts given in the opinion, to be inconsistent with all the other decisions of this court above noticed, and has not been cited in any of them.

In *State v. Chinault*, 55 Kan. 326, 40 Pac. 662, the defendant was charged by information in the district court of Wyandotte county for an assault with intent to kill, was put upon his trial, but the jury were discharged, for sufficient cause, and the case went over. Afterward he was prosecuted in the court of common pleas on a charge of assault with intent to rob, the two transactions being identical, the only difference in the two informations being that a different criminal purpose is charged. It was held that only one prosecution can be maintained for the same assault, whatever the purpose of the defendant may have been.

Moore v. State, 71 Ala. 307, is directly in point. It was held: "A single crime cannot be split up or subdivided into two or more indictable offenses"; that "to an indictment for assault with intent to murder, a plea of a former conviction of an assault and battery with a stick, in the county court, based on the same criminal act, is good, although the offense charged in the indictment is a felony, and the offense for which there was a former conviction is merely a misdemeanor." (Syllabus.) In the opinion it is said: "A conclusive reason for the soundness of this view, to our mind, is, that if a defendant has been tried for the smaller offense—whether convicted or acquitted, it is immaterial—and he is afterward put on trial for the larger, he is twice in jeopardy for the smaller offense."

In *Jackson v. State*, 14 Ind. 327, 328, it was said: "The state cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime."

In *People v. Hunkeler*, 48 Cal. 331, the defendant was indicted for manslaughter, and upon the trial the court, without the consent of the defendant, discharged the jury, because in its opinion the defendant was shown to be guilty of murder, and being afterward indicted for murder, his plea of twice ¹⁹⁷ in jeopardy was sustained by this court, which held he was entitled to an acquittal.

In England, prior to Lord Denman's Act (Stats. 1 Viet., c. 85. sec. 11, enacted in 1837), one indicted for a felony could not be convicted and sentenced for a misdemeanor. The reason for that rule was, that persons indicted for a misde-

meanor had certain advantages or privileges, among others, that of making full defense by counsel, which those charged with a felony did not then have. But Lord Denman's Act provided that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, there might be an acquittal of the felony and a conviction of the assault. The vital principle of that act is embodied in section 1159 of our Penal Code. There are many cases, however, in this country that have followed, in their results at least, the old common law, and permit different crimes included in the same act or transaction to be separately prosecuted and punished. All offenses, such as battery, mayhem, rape, robbery, etc., as well as assaults with intent, necessarily include an assault, and it is now generally conceded that a conviction of the higher offense is necessarily a conviction of the assault included in it, and it would seem to follow logically, as well as by construction, that a conviction or acquittal of any of the included offenses must bar a prosecution of the higher, since the higher cannot afterward be prosecuted without opening the door for a second conviction, or a conviction of an offense for which the defendant had before been tried and acquitted. It is well settled that a conviction of a lower included offense is an acquittal of all higher offenses included in the indictment or information, and where such conviction for a lower offense is set aside and a new trial granted, even upon the motion of defendant, or upon appeal, he cannot be convicted of any higher offense than that of which he was first found guilty. If an acquittal can have such effect, much more strongly it should be held that a prior conviction of any included offense should bar a subsequent prosecution for a higher offense included in the same transaction.

Bishop, in his *New Criminal Law* (section 1058) says that "by the general and better doctrine a conviction or acquittal of a common assault will bar proceedings for an assault with ¹⁹⁸ intent to do great bodily harm, and other assaults aggravated in like manner. It has been supposed that if the tribunal trying the less offense has no jurisdiction over the higher, the case will be different; yet there does not seem to be any just foundation for this distinction. The fact that one has been in jeopardy for a lower offense is true equally whether the court had authority to try the higher or not."

All criminal prosecutions are by the state, which is a single entity. It may choose its forum, and determine for what

particular offense it will prosecute the citizen for a violation of the criminal law. It cannot complain if it has made an unwise selection, but having made its selection and inflicted the penalty it has imposed for such violation, the constitution interposes for the protection of the accused and declares that he shall not be twice put in jeopardy for the same offense, and this provision, being for the benefit and protection of the accused, is to be liberally construed. "The rule of interpretation is in many of the cases not thought of by the courts, and other obvious principles are overlooked, so that our books contain numerous decisions wherein this constitutional right has been denied to the prisoner": **Bishop's New Criminal Law, sec. 1070.**

That there are numerous decisions in other jurisdictions inconsistent and even contradictory to this, and prior decisions of this court, hereinbefore cited, may be admitted. A recent example is that of *State v. Caddy*, 15 S. Dak. 167, 91 Am. St. Rep. 666, 87 N. W. 927, where it was held that "an acquittal on trial under Compiled Laws, section 6491, charging an assault on a certain person with a deadly weapon with intent to rob, is not a bar to a conviction under section 6181 on an indictment charging robbery in taking money from such person against his will by force." The transaction was the same. In that state, as here, they have a statute permitting a conviction of any lesser offense necessarily included in that charged in the indictment. Many cases were cited in the opinion, the first of which is *Morey v. Commonwealth*, 108 Mass. 433. In that case the record showed that the first indictment charged that the defendant and Bridget Kennedy during a time specified "did lewdly and lasciviously associate and cohabit together, not being married to each other." The second indictment charged that the defendant, being a married man and having a lawful wife, ¹⁹⁹ committed adultery with the same woman at specified dates included in the first indictment. The court held that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." Here there were two offenses, not "necessarily included" in each other. Under the first indictment the defendant could not have been convicted of adultery charged in the second, though in his illicit cohabitation he committed adultery and he might have committed adultery without having been guilty of il-

licit cohabitation. The court however, further said: "An acquittal or conviction upon an indictment for murder is a bar to a subsequent conviction upon an indictment for manslaughter or assault by the same act by which the murder was charged in the first indictment to have been committed, because such a conviction might have been had upon the first indictment. And so, e converso, an acquittal or conviction of the manslaughter is a bar to a subsequent indictment for the murder."

So the Dakota case cites *Commonwealth v. Roby*, 12 Pick. 496, where it was held that a conviction of an assault with intent to murder was no bar to an indictment for murder; but in *Morey v. Commonwealth*, 108 Mass. 433, the court remarked that the Roby case was decided "before our statutes permitted a conviction of such an assault upon an indictment for murder."

So it may be concluded that in England, since Lord Denman's Act, and in this country wherever a statute permits a conviction of any lower offense necessarily included in a higher one with which the defendant is charged, a conviction or acquittal of such higher offense is a bar to a subsequent prosecution for any lower offense necessarily included in it, and, e converso, a conviction for any lower offense necessarily included in the higher, is a bar to a subsequent prosecution for such higher offense, and this conclusion is fully sustained by the prior decisions of this court hereinbefore cited.

Of course, if the former conviction was procured by the fraud, connivance, or collusion of the defendant, this fact vitiates it, and it is no bar to a subsequent prosecution: *State v. Little*, 1 N. H. 257; *State v. Lowry*, 1 Swan, 34; *State* ²⁰⁰ *v. Reed*, 26 Conn. 202; 1 Bishop's Criminal Law, secs. 1008, 1010. But here there is no pretense that the prosecution before the justice was fraudulent. The constitutional provision here involved was made for the protection of the citizen, and should be liberally construed in his favor. In *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490, it was said: "Where the state has thought proper to prosecute the offense in its mildest form, it is better that the residue of the offense go unpunished than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen."

In the case at bar all the facts were presented to the justice and considered in fixing the penalty imposed. In the superior court the evidence heard and considered by the justice was excluded, as well as evidence of the punishment imposed. The

superior court, therefore, had no knowledge of the prior proceedings and the penalty imposed, and must have, to the extent of the punishment imposed by the justice, imposed a second, or double, punishment.

Our conclusion is, that the court below erred in rejecting the evidence of the former conviction, and that the judgment and order appealed from should be reversed and the cause remanded.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded.

Garoutte, J., Van Dyke, J., Harrison, J.

IDENTITY OF OFFENSES IN A PLEA OF FORMER JEOPARDY.*

I. Rule Against Double Jeopardy for the Same Offense.

- a. Origin.
- b. Plea of Autrefois Attaint.
- c. In General—Scope of Note.

II. Identity of Defendants.

- a. General Rule.
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- a. United States and State.
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Whether granting new trial in criminal case may subject defendant to conviction for a higher offense: 4 Am. St. Rep. 117-120.

Rule against double jeopardy for same offense as affecting constitutionality of statutes imposing a heavier penalty for a second offense: 64 Am. St. Rep. 375-381.

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Jeopardy—Appeal by state after acquittal: 48 Am. St. Rep. 213-215.

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 - (1) View That Application of Test is not Enough to Make Even Prima Facie Case of Identity.
 - (2) Contrary View.
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- h. Difference Between Prior Conviction and Prior Acquittal.
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- f. Continuing Offenses—Different Periods of Time.
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12. Assault and Miscellaneous Offenses.

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1. Generally.

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6. And Embezzlement.

7. And Statutory Offenses.

- o. Burglary and the Felony Committed After the Breaking and Entering.**
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- q. Intoxicating Liquors.**
 - 1. Several Illegal Sales of.**
 - 2. One Sale Constituting Several Offenses.**
 - 3. Illegal Sale of, and Being a Common Seller of.**
 - 4. Being a Common Seller of, and Maintaining a Liquor Nuisance.**
 - 5. Illegal Sale of, and Maintaining a Liquor Nuisance.**
 - 6. Miscellaneous.**
- r. Keeping Gaming-house, etc.**
- s. Miscellaneous.**

I. Rule Against Double Jeopardy for the Same Offense.

a. Origin.—It is a principle founded in obvious justice and one which early found recognition in the common law, that no man should be twice pursued civilly or criminally for the same cause. As applied to civil actions, this principle was expressed in the maxim, "*Nemo debet bis vexari pro eadem causa.*" In criminal law it appeared in the maxim, "*Nemo bis punitur pro eadem delicto.*" Whether this latter principle was, as Mr. Justice Story has said, "embedded in the very elements of the common law" (see 3 Greenleaf on Evidence, sec. 535), or, as Mr. Bishop would have it, "a mere deduction made by some judge or text-writer from the adjudications, which must govern if found in conflict with it" (Bishop's Criminal Law, 982), is of but little importance at this time. In this country, at least, it has become "imbedded in the very elements" of the fundamental law, by constitutional provisions of which that in the fifth article of the amendments to the federal constitution is a type, and in those few jurisdictions in which the matter is not settled by written law, it is quite as well settled by an undoubted recognition of such provisions as the mere embodiment of a common-law rule. That the provision of the United States constitution already referred to, which prohibits that any "person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb," does not bind the states is now well settled: See *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390; *Greenwood v. State*, 65 Tenn. (6 Baxt.) 567, 32 Am. Rep. 539; *Jones v. Commonwealth*, 20 Gratt. (Va.) 848; *Briggs v. Commonwealth*, 82 Va. 554. The constitutions of nearly all the states, however, contain the same or similar provisions, and where they do not, the courts in those jurisdictions receive the federal constitution as in this respect enunciative of the common-law rule: *Briggs v. Commonwealth*, 82 Va. 554. See, also, *Hopkins v. United States*, 4 App. D. C. 430.

b. Plea of Autrefois Attaint.—Of the plea known to the common law as *autrefois attain*t or prior attainder, little need here be said.

The plea rested upon considerations which are now everywhere obsolete, and which, in this country, have never found foothold. Attainder and corruption of blood as consequences of conviction for felony are now of historical interest only, and an early case in Tennessee (*Crenshaw v. State*, 8 Tenn. (Mart. & Y.) 122, 17 Am. Dec. 788) is, perhaps, the only instance in the country in which the plea has been recognized. The monographic note appended to that case (17 Am. Dec. 791-795) quite exhaustively considers the doctrine of prior attainder, and, together with the lack of practical importance of the subject, renders further consideration here unnecessary.

c. **In General—Scope of Note.**—A discussion of the law involved in the plea of former jeopardy divides itself naturally into the determination of two questions—when can one be said to be “put in jeopardy,” and what is meant by “the same offense.” It is to the latter of these questions that an answer is to be attempted in the following discussion.

The statement of the rule, so far as the identity of offenses, is plain. No one is to be twice put in jeopardy for the “same offense.” In its application to particular cases as they occur, however, no principle has given rise to greater difficulties or more confusion; and, in their endeavor to apply it, the courts have indulged in hair-width distinctions, until the subject has become, in the words of one author, “a labyrinth of subtleties.” There are, however, certain general principles, some of which are fairly well settled, although there are but few not involved in some conflict. These general principles will be first considered, and will be followed by a consideration of their application to the particular classes of offenses between which the question of identity has arisen.

II. Identity of Defendants.

a. **General Rule.**—There must be identity of person and of offenses. The constitutional provision and the rule of the common law do not shield one person from prosecution for his crimes, merely because another person may have been prosecuted for a crime arising out of the same transaction. Thus, where a clerk violates a statute against the sale of liquor, it is no defense that his employer has been convicted for the same offense: *State v. Pinan*, 10 Iowa, 19. And a prosecution against one for the violation of a statute of this kind, or for being a common seller of liquor, is not barred by a prior prosecution against that person’s husband or wife, although both charges may be based upon the same act or acts, and one of the parties acted simply as the agent of the other: *Commonwealth v. Heffron*, 102 Mass. 148; *Commonwealth v. Welch*, 97 Mass. 593; *State v. Leonard*, 72 Vt. 102, 47 Atl. 395. Nor does the prosecution of one partner bar a prosecution against another for illegally keeping a gaming table. They are indicted as individuals, and not as a firm: *Goforth*

v. State, 22 Tex. App. 405, 3 S. W. 332. See, also, *Williams v. Commonwealth*, 85 Va. 607, 8 S. E. 470.

b. **Prior Acquittal of Codefendant.**—In line with this principle, it is well settled that where several persons are jointly indicted, the acquittal of one does not necessarily carry with it the acquittal of his codefendants, nor does it bar a subsequent prosecution and conviction of the latter: See *State v. Ross*, 29 Mo. 32; *State v. Orr*, 64 Mo. 339; *Goforth v. State*, 22 Tex. App. 405, 3 S. W. 332; *Williams v. Commonwealth*, 85 Va. 607, 8 S. E. 470. This does not, however, in any true sense, present any question of former jeopardy. The question becomes somewhat more involved in cases where two are jointly charged with an offense which is necessarily joint, and in which the acquittal of one defendant might be held to negative possible guilt on the part of another. Such are cases of adultery, incest, etc. Even in these cases, however, the question presented is not one of former jeopardy, but rather of prior adjudication, and will not, therefore, be discussed: See, in this connection, *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207, and cases cited.

c. **Prosecution Severally After Acquittal Jointly.**—Where several are indicted jointly for an offense, and all are acquitted, in the event of a subsequent prosecution against one of them singly, or with fewer codefendants than before, the question presented is then, properly speaking, one of former jeopardy. By the weight of authority it seems that, in such a case, the first prosecution furnishes an effective bar to the second, since on both indictments proof of an offense committed by the defendant jointly with the codefendants named in the first indictment would be sufficient to convict the defendant: *Rex v. Dann*, 1 Moody C. C. 424; *Rex v. Parry*, 7 Car. & P. 836. See, also, *McGehee v. State*, 58 Ala. 360. The authorities are not, however, in entire harmony as to this, and in *Commonwealth v. McChord*, 32 Ky. (2 Dana) 242, it is held that, where several parties are charged with committing an offense jointly, and the evidence shows a several act by each, the defendants, although entitled to an acquittal on that charge, may subsequently be prosecuted severally. Mr. Wharton (*Wharton on Criminal Pleading and Practice*, section 463) cites the case as one in which the former prosecution was erroneous "for joining persons for an offense which could not be committed jointly, as for perjury," but the case was one in which the offense charged (obstructing a highway) might well have been jointly committed, and it is difficult to distinguish the case from *McGehee v. State*, 58 Ala. 360, in which an opposite conclusion is reached.

III. Identity of Sovereignties, etc., or of Laws Violated.

a. **United States and State.**—As will hereinafter be seen in a number of connections, the same act may and frequently does consti-

tute several "offenses." A most forcible illustration of this is where one act violates the statutes of two sovereignties, to the laws of both of which the offender is amenable. Thus, a single act may be at one and the same time an offense against the state in which the party committed it and against the laws of the United States. Where this is the case, it is now well settled that the offender may be indicted and prosecuted by either or by both; and an acquittal or conviction in the state courts furnishes no bar to a prosecution in the federal courts, or vice versa. "An offense, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be a transgression of the laws of both. Thus an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, as riot, assault or a murder, and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet, it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar of a conviction by the other": *Moore v. Illinois*, 14 How. (U. S.) 13.

In the case from which the above quotation is made it was held that the act of harboring and secreting a negro slave might be punished by both the United States and by the state in which the offense was committed: *Moore v. Illinois*, 14 How. 13. Other instances of offenses likewise held punishable by both the federal and state governments are the counterfeiting of coin of the United States: *Fox v. Ohio*, 5 How. 410 (compare, however, *Commonwealth v. Overby*, 3 Ky. Law Rep. 704); selling liquor to Indians: *Oregon v. Coleman*, 1 Or. 191, 75 Am. Dec. 554; theft from United States mails: *Negro Ann Hammond v. State*, 14 Md. 149, note; killing Indian on Indian reservation: *United States v. Barnhart*, 22 Fed. 285; forgery and the making of false entries in the books of a national bank in pursuance of a single fraud: *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47. And for other cases recognizing this principle, see *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 518; *Thersen v. McDavid*, 34 Fla. 440, 16 South. 321; *Wragg v. Penn Township*, 94 Ill. 11, 34 Am. Rep. 199; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 South. 187; *State v. Rankin*, 4 Cold. (Tenn.) 145; *Hendrick v. Commonwealth*, 5 Leigh (Va.), 707.

b. **United States and Territories.**—In *State v. Norman*, 16 Utah, 457, 52 Pac. 986, this principle was extended from that class of cases

in which the laws of the United States and of a state both provide for punishment of the same act to cases in which the double inhibition is found in the laws of the United States and of a territory. The question whether punishment might be inflicted under both laws was not in that case directly before the court, since there had been no prior prosecution under the federal law, and the only question was whether the law passed by the territorial legislature of Utah, punishing adultery, polygamy, etc., was or was not void, because of the similar legislation of Congress in the Edmunds-Tucker law. The court, however, argues that not only was the territorial statute valid, but that punishment for its violation would not bar and would not be barred by a prosecution for the same act under the federal law. Mr. Chief Justice Zane dissented, and thus disposed of the analogy attempted to be drawn from the principle allowing punishment by both the United States and a state. "In that case the state law is for the protection of its people and not for the people of the United States. The source and purpose of such laws differ. One proceeds from state sovereignty; the other from the sovereign power of the United States. One is to punish the wrong to the state; the other, the wrong to the United States. They do not exercise the same power as Congress and the territories do in legislating for the territory. The congressional law and the territorial law in this case proceed from the same source—from the United States—and are for the same territory and people. It is the same power, exercised in the one case by Congress, and in the other by the territory."

The distinction here drawn seems a valid one. Where the United States and a state both punish the same act, the punishment is imposed by two sovereignties, each to a great extent independent of the other. Indeed, as is said in *United States v. Barnhart*, 22 Fed. 285, by Deady, J., "it is impossible that the United States can maintain its paramount authority over the subjects committed by the constitution to its jurisdiction, and at the same time allow a trial in a state court on a criminal charge growing out of an act that Congress has defined to be a crime to be a bar to a prosecution thereof in its own courts and according to its own laws." In the case of territorial legislation no such considerations are present. Congress may grant to, or take from, the territorial legislature as much power as it wishes. The territories and their governments are mere convenient instrumentalities for the exercise by Congress of its exclusive jurisdiction over them. When, therefore, an act is made criminal by territorial legislation, it is made so indirectly by an act of Congress; and to hold punishment under such a statute no bar to a subsequent prosecution for the same offense as violative of another law passed directly by Congress, is to punish twice for one offense against the same sovereignty.

c. Federal Court-martial and State Court.—A prosecution before a court-martial of the United States is not, it is held, for reasons already suggested, a bar to a subsequent prosecution by the courts of a state: *State v. Rankin*, 44 Tenn. (4 Cold) 145 (see also, *Coleman v. Tennessee*, 97 U. S. 506 and *In re Fair*, 100 Fed. 149); and, vice versa, a prosecution before a civil court of a state is no bar to a subsequent trial before a court-martial of the federal army: *Stemmer's Case*, 6 Opin. Atty. Gen. 413. It seems, however, that, under the decisions, a prosecution before a court-martial is ineffective to bar a prosecution even in the other courts of the United States: See post, III, g.

d. Different States.—If, as we have seen, the federal and state governments are so distinct that the punishment of an offense against the sovereignty of one cannot operate as a bar to a prosecution in the courts of the other for a violation of its laws, though both be caused by one and the same act, the same rule should apply with even greater force to prosecutions by two or more of the several states. Each is sovereign within its own boundaries. "It is a general principle that the laws of a country do not extend beyond its territorial limits, and this is especially so as to criminal laws, and it is also a general principle that the conviction and punishment of an accused in one sovereignty is no bar to his conviction and punishment in another, in which the offense was originally committed": *Phillips v. People*, 55 Ill. 429. To the same effect, see *Bloomer v. State*, 48 Md. 521; *Marshall v. State*, 6 Neb. 120, 29 Am. Rep. 363. See, in this connection, *State v. Brown*, 1 Hayw. (N. C.) 116, 1 Am. Dec. 548. In *Commonwealth v. Frazee*, 2 Phila. 191, a prosecution in New Jersey was held to bar a subsequent prosecution in the courts of Pennsylvania, but the holding was because of a compact between the two states by which the jurisdiction of offenses committed on the river Delaware was exclusively vested in the state wherein the offender was first prosecuted. And while it is said that where the defendant has already undergone punishment in one state and is prosecuted for the same act in another, "as a merciful dispensation the courts would undoubtedly consider favorably to the defendant the fact, if it existed, that he had been punished for the same act in a foreign country" (*Marshall v. State*, 6 Neb. 120, 29 Am. Rep. 363, quoting 1 Bishop's Criminal Law, sec. 986), it is difficult to see how this could avail, except perhaps in the extent of punishment inflicted where that was in the discretion of the court.

In many, if not in most, of the states statutory provision has been made for a plea of former conviction or acquittal in a foreign state. Of these the following California statute is a type: "Whenever, on the trial of an accused person, it appears that, upon a criminal prosecution under the laws of another state, government or country,

founded on the act or omission in respect to which he is on trial, and has been acquitted or convicted, it is a sufficient defense. Gen. Stat. Code, sec. 656. See, also, in this connection, *Poss v. Grimes*, 5 Kan. App. 763, 48 Pac. 596.

e. Different Counties of the Same State.—Where the former prosecution was had in the same state as that in which the charge is again sought to be put on trial, but in another county, the concept of distinct sovereignties is, of course, absent. Ordinarily, however, the question arises when, in the former prosecution, the venue was wrongly laid. In such a case the subsequent charge is necessarily, because of a material variance between the allegations of the indictment and the proof which required an acquittal of the defendant: See post, V, e. "Generally, the rule is, as at common law, that an acquittal can only be pleaded in the same county, and the reason assigned is, because all indictments are local, and therefore if the first were laid in a wrong county, the defendant could not be found guilty upon it, and consequently was in no danger, and therefore could not plead an acquittal upon it in bar of a subsequent indictment for the offense in the proper county": *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621. To the same effect, see *Methard v. State*, 19 Ohio St. 363; *Commonwealth v. Somerville*, 1 Va. Cas. 164, 5 Am. Dec. 514.

In *Hawkins' Pleas of the Crown*, book 2, chapter 35, section 4, an exception to this at common law is stated: "But if a man steal goods in one county and then carry them into another, in which case it is certain that he may be indicted and found guilty in either, it seems very reasonable that an acquittal in one county for such stealing may be pleaded in bar of a subsequent prosecution for the same stealing in another county, because the defendant may be altogether as well convicted in the one county as in the other; and therefore, if he could not bar the second prosecution by his acquittal on the first, his life would be twice in danger from that which is in truth but one and the same offense, and only considered as a new one by a mere fiction or construction of law which shall hardly take place against a maxim made in favor of life." However, this may be where both prosecutions are for larceny of the same goods, a prosecution for burglary in one county is not a bar to a charge of larceny into which the accused brings the goods stolen, burglary and larceny being regarded as distinct offenses: *Sharp v. State*, 61 Neb. 187, 85 N. W. 38. See, also, *State v. Cooper*, 13 N. J. L. 307, 1 Am. Dec. 490, and post, VI, n, 5.

In *Commonwealth v. Lloyd*, 141 Pa. St. 28, 21 Atl. 411, the defendant had been prosecuted in A county for fornication and bastardy, but had been convicted of fornication only, it appearing that the child had been born in B county. It was then attempted to hold him for the bastardy in B county by an indictment charging forni-

cation and bastardy. The court held that the plea of former conviction was a sufficient bar, saying: "While it is true that this offense may be so far separated as to charge fornication in one count of an indictment and bastardy in another, yet the bastardy is but an incident of the fornication, the result of a single act. Hence, we do not think the commonwealth can prosecute for the one offense in one county and for the other in a different county. In other words, there may be two counts, but not two prosecutions."

f. State Law and Municipal Ordinance.

1. General Rule.—In considering the instances in which the identity of offenses in a plea of former jeopardy is affected by the existence of two jurisdictions there remains to be considered those cases in which the same act violates both a state statute and a municipal ordinance. Upon authority it is now settled beyond a doubt that the same act may constitute an offense against both the state and a municipality, and may be punished by either or by both without offending the constitutional or common-law rule which prohibits a double jeopardy for the "same offense": *Mayor of Mobile v. Allaire*, 14 Ala. 400; *Englehart v. State*, 88 Ala. 100, 7 South. 154; *Town of Van Buren v. Wells*, 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38; *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799; *Huffsmith v. People*, 8 Colo. 175, 54 Am. Rep. 550, 6 Pac. 157; *Hughes v. People*, 8 Colo. 536, 9 Pac. 50; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 518; *Theesen v. McDavid*, 34 Fla. 440, 16 South. 321; *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214, 16 South. 398; *Bueno v. State*, 40 Fla. 160, 23 South. 862; *McRae v. Mayor*, 59 Ga. 168, 27 Am. Rep. 390; *De Graffenreid v. State*, 72 Ga. 212; *Purdy v. State*, 68 Ga. 295; *Wragg v. Penn Township*, 94 Ill. 11, 34 Am. Rep. 199; *Robbins v. People*, 95 Ill. 175; *Ambrose v. Stone*, 6 Ind. 351; *Bloomfield v. Trimble*, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586; *Kemper v. Commonwealth*, 85 Ky. 219, 7 Am. St. Rep. 593, 3 S. W. 159; *Fortner v. Duncan*, 91 Ky. 171, 15 S. W. 55 (compare, however, *Lynch v. Commonwealth*, 18 Ky. Law Rep. 145, 35 S. W. 264); *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 South. 187; *State v. Clifford*, 45 La. Ann. 980, 13 South. 281; *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *State v. Lee*, 29 Minn. 445, 13 N. W. 913 (compare *State v. Oleson*, 26 Minn. 507, 5 N. W. 959); *Johnson v. State*, 59 Miss. 543; *State v. Gustin*, 152 Mo. 108, 53 S. W. 421; *State v. Muir*, 164 Mo. 610, 65 S. W. 285; *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145; *State v. Stevens*, 114 N. C. 873, 19 S. E. 861; *State v. Reid*, 115 N. C. 741, 20 S. E. 468; *Koch v. State*, 53 Ohio St. 433, 41 N. E. 689, affirming 8 Ohio C. C. Rep. 641; *State v. Sly*, 4 Or. 277; *State v. Bergman*, 6 Or. 341; *City Council of Anderson v. O'Donnel*, 29 S. C. 355, 13 Am. St. Rep. 728, 7 S. E. 523; *Greenwood v. State*, 65 Tenn. (6 Baxt.) 567, 32 Am. Rep. 539; *State*

v. Shelby, 84 Tenn. (16 Lea) 240; *Hamilton v. State*, 3 Tex. App. 643 (see below for later cases under Texas statute); *United States v. Hood*, 2 Cranch C. C. 133, Fed. Cas. No. 15,385; *United States v. Wells*, 2 Cranch, 45, Fed. Cas. No. 16,662. See contra dictum in *State v. Welch*, 36 Conn. 216.

In Missouri the earlier cases took a view opposed to that above stated to be supported by the weight of authority and held a prosecution under a municipal ordinance to be a bar to a subsequent indictment under a state statute for the same criminal act: See *State v. Simonds*, 3 Mo. 414; *State v. Cowan*, 29 Mo. 330; *State v. Thornton*, 37 Mo. 360; *City of Pilot Grove v. McCormick*, 56 Mo. App. 539; *State v. Freeman*, 56 Mo. App. 579. Later decisions, reviewed in the opinion of Sherwood, P. J., in *State v. Muir*, 164 Mo. 610, 65 S. W. 285, however, changed the rule in that state, and it is now in accord with the doctrine that where the same act violates a municipal ordinance and a state statute, prosecutions under both are not for the "same offense."

2. **Under Statutes.**—In Texas, on the other hand, the earlier cases were in accord with the weight of authority in this respect (*Hamilton v. State*, 3 Tex. App. 643), but by the Code of Criminal Procedure of that state it is now provided that: "No person shall be punished twice for the same act or omission, although such act or omission may be an offense against the penal laws of the state, as well as against the ordinances of such city or town; provided, that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission or offense than is prescribed by the statutes where such act or omission is an offense in the state": *Tex. Code Cr. Proc.*, art. 931. See, in this connection, *Davis v. State*, 39 S. W. 937, reversing 38 S. W. 616. A similar statute exists in Arkansas, except that under it the prosecution for the violation of the city or town ordinance is held to bar a prosecution under the state statutes, although the former does not impose as heavy a penalty as the latter: *Richardson v. State*, 56 Ark. 367, 19 S. W. 1052. In Alabama, in order that the prosecution in the municipal courts shall be a bar, it must have been for the violation of a state statute. If it was for a breach of a municipal ordinance, it furnishes no basis for a plea of former jeopardy in a prosecution in the state courts: *Harris v. State*, 128 Ala. 41, 29 South. 581. See, also, *Powell v. State*, 89 Ala. 172, 8 South. 109.

3. **Reasons Advanced for General Rule.**—In the absence of statutory provisions, the authorities are now singularly uniform in their adoption of the doctrine that an act which offends against both a municipal ordinance and a state statute may be punished under both. They are not, however, equally uniform in the reasons advanced for the doctrine. By some the act is deemed to constitute an offense against each of two distinct sovereignties, and a supposed analogy

is drawn from the right of the federal and state governments to punish for the same act. "Since the act constitutes two distinct offenses against separate jurisdictions, it is analogous to those cases where the same fact is punishable under a congressional statute and also under a state law. The offenses being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense": *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 518. For other instances of this view, see *Town of Van Buren v. Wells*, 53 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38; *Theisen v. McDavid*, 34 Fla. 440, 16 South. 321; *Ambrose v. State*, 6 Ind. 351; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 South. 187; *State v. Sly*, 4 Or. 277. There is, however, an obvious distinction, similar to that already noted in another connection (see *supra*, III, b), between punishments inflicted by the federal and state governments and those cases in which both the state and a municipal corporation assume to punish the same act. In the former the sovereignties are distinct; in the latter, the state punishes twice, the municipality owing its existence to, and its only power to inflict punishment being derived from, the state. "The cases in which it has been held that where the same act is an offense against a law of the United States, and also of a state, a conviction under one is no bar to an indictment under the other, do not apply in principle where it is proposed to punish an act several times, because several times prohibited by or under authority of the same political jurisdiction, which is this case": *Gilfillan, C. J.*, in *State v. Oleson*, 26 Minn. 507, 5 N. W. 959.

Another reason advanced by some of the authorities is that a prosecution under a municipal ordinance is not a criminal, but a civil proceeding, and is not, therefore, a bar to, nor barred by, a criminal prosecution under a state statute: See, for instance, *State v. Muir*, 164 Mo. 610, 65 S. W. 285; *State v. Gustin*, 152 Mo. 108, 53 S. W. 421. Still a third argument is that the city ordinance is a mere by-law or police regulation while the state statute is intended to punish the offense against the dignity of the state. The cases advancing this as the basis of the doctrine are, perhaps, the most numerous. "The ordinances and by-laws of the city . . . which provide for the good order, peace and morals of the city are mere police regulations, and form no part of the criminal jurisprudence of the state. The state exercises its judicial power in criminal cases arising under the general criminal jurisdiction of the state, and where its peace, good order and dignity are involved": *Kemper v. Commonwealth*, 85 Ky. 219, 7 Am. St. Rep. 593, 3 S. W. 159. See, also, *Mayor v. Anaire*, 14 Ala. 400; *State v. Clifford*, 45 La. Ann. 989, 13 South. 281; *Snaffer v. Munnea*, 17 Md. 331, 79 Am. Dec. 656; *City Council v. O'Donnell*, 29 S. C. 355, 13 Am. St. Rep. 728, 7 S. E. 523. Of these various arguments, *Stone, J.*, in *Hughes v. People*, 8 Colo. 536,

9 Pac. 50, very properly observes that he cannot help regarding these distinctions as refined, and more fictitious than real, and that the reasons given in the decisions in justification of what, after all, is practically double punishment for the same act, fail to satisfy him of the logical soundness of the doctrine. On authority, however, the rule is now settled, and while it seems hardly defensible upon principle, it is the undoubted law that one act may be punished by both the state and the municipality.

g. Federal Courts and Courts-martial.—A prosecution before a federal court-martial does not, as we have seen, bar a subsequent prosecution before a state court and under a state statute for the same act: See *supra*, III, c. This is not, however, solely because the federal and state governments may both punish the same act if it violate the laws of both. The same rule holds true where both prosecutions are in the federal courts: See *United States v. Clark*, 31 Fed. 710; *United States v. Cashier*, 1 Hughes (U. S.), 560, Fed. Cas. No. 14,744. In the case last cited the question is considered at some length, and while in that case it was further held by the court that the offenses charged in the two prosecutions were not identical, the effect of the opinion is to allow of prosecution both before the courts-martial and the civil courts.

h. Punishment Criminally and for Contempt of Court or of Legislature.—Similarly, it is held that punishment by a court or legislative body of an act which constitutes a contempt does not bar a prosecution for a violation of a penal statute, though the same act constitutes the basis of both proceedings. The act is in such a case said to constitute two offenses. "One offense violates the law which protects courts of law and stamps an efficient character on their proceedings. The other is levied against the general law which maintains the public order and tranquility." The punishment for a contempt and a conviction on indictment for the same act as a crime are, it is said, *diverso intuitu*, and will stand together: *State v. Yaney*, 1 Car. Law Rep. 519, 6 Am. Dec. 553; *State v. Gardner*, 72 N. C. 379; *State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161; *United States v. Houston*, Fed. Cas. No. 15,398, 4 Cranch C. C. 261; *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. Rep. 677. See, also, *Wragg v. Penn Township*, 94 Ill. 11, 34 Am. Rep. 199; *State v. Williams*, 2 Spear (S. C.), 26. On the same principle, a prosecution on the charge of procuring an abortion is no bar to a proceeding to revoke the certificate of a physician: See *In re Smith*, 10 Wend. 449. As to whether a criminal prosecution is a bar to an action in rem to declare forfeited the ship or other property used in furtherance of the illegal act (and vice versa), see *United States v. Three Copper Stills*, 47 Fed. 495; *Freeman on Judgments*, sec. 319; *United States v. Olsen*, 57 Fed. 579, and cases there cited.

IV. To What Class of Offenses Rule Against Former Jeopardy Applies.

The phrase "life and limb," as used in the fifth amendment to the federal constitution, and in the provisions of the various state constitutions, would, if strictly interpreted, confine the present day operation of the plea of former jeopardy to a very small class of cases, by impliedly allowing double punishment for all which do not involve danger to "life or limb." The courts have, however, given to this phrase a meaning far more consonant with the spirit of the provision, and have held it to embrace all cases in which a second prosecution is attempted for the same offense, whether it be a felony or a misdemeanor: See *Williams v. Commonwealth*, 78 Ky. 93; *State v. Cheevers*, 7 La. Ann. 40; *Commonwealth v. Roby*, 29 Mass. (12 Pick.) 496; *State v. Behimer*, 20 Ohio St. 572; *Jones v. Commonwealth*, 20 Gratt. (Va.) 848; *Beckowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379; *Ex parte Lange*, 18 Wall. (U. S.) 163. Where this result has not been reached by a construction of the constitutional provision, it is deemed to flow from the rule as it existed at common law: *Greenwood v. State*, 65 Tenn. (6 Baxt.) 567, 32 Am. Rep. 539. In Arkansas, however, the words "life and limb" seem to be given a meaning which restricts the operation of the plea of former jeopardy to offenses of an infamous nature, and such as are punishable by imprisonment. Misdemeanors punishable by fine only are held not within the constitutional provision in that state: *Taylor v. State*, 36 Ark. 84 (distinguished in *Southworth v. State*, 42 Ark. 270, and in *People v. Miner*, 144 Ill. 308, 313, 33 N. E. 40).

V. Identity of Offenses—General Principles.

a. **Must be for Same "Act" and "Offense."**—The books are full of statements that the offenses, in order to be the same, must be the "same in law and in fact," must be the "same act and crime," or that the plea of former jeopardy does not prohibit a second prosecution for the same "act," but for the same "offense." These are, of course, generalities, and almost the entire discussion in this note will be devoted to an effort to ascertain by what rules it is to be determined when the offenses are the same "in law and in fact," and to apply those rules to specific cases. What is meant by this general distinction is, however, well expressed by Chief Justice Shaw in *Commonwealth v. Roby*, 12 Pick. 496: "Mr. Justice Blackstone states it thus: That the pleas of a former acquittal and former conviction must be upon a prosecution for the same identical act and crime: 4 Blackstone's Commentaries, 336. It must therefore appear upon facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be a great similarity in the facts, where there is a substantial legal difference in the nature of the crimes; and on the contrary there may be a consider-

able diversity of circumstances where the legal character of the offense is the same. As where most of the facts are identical, but by adding, withdrawing or changing some one fact, the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with an intent to steal. These are distinct offenses: [See post, VI, n, 5, VI, o] *Rex v. Vandercomb*, 2 Leach, 816. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offenses are to be regarded as the same."

The effect of this is, not so much to indicate what is decisive of the identity of two offenses, as to show what is not decisive. The mere fact that in both indictments the offenses charged are known by the same name is not in itself sufficient where they were in fact caused by different acts of wrongdoing. On the other hand, the mere fact that one wrongful "act" or "transaction" gives rise to two charges does not in itself establish their identity, where the offenses charged are different from a legal point of view.

b. Tests of Identity. (See, also, post, V, g.)

1. Usual Test.

A. Statement of Test.—To determine when the offenses charged in the two indictments are the same in "fact and law," the same "act and crime," the courts have suggested several tests. The one most frequently employed is that stated by Buller, J., in *Rex v. Vandercomb*, 2 Leach C. C. 708, in the following language: "Unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." In some states this test is accepted without qualification as determinative in all cases of the identity of the offenses; in some, it is treated as *prima facie* merely (see, post, V, g); in others as true with certain changes or qualifications hereafter to be discussed; and in its application the courts have been, by no means, uniform or consistent. It has, however, been recognized with varying force in all the states, and, as is said in the monographic note to *Roberts v. State*, 58 Am. Dec. 536, 537, the contrariety of opinion which obtains in its application "is not astonishing when the generality and consequent elasticity of the rule is considered." The number of instances in which in almost every jurisdiction this test has been recognized or applied renders the citation of all these cases here impossible, and but a few from each jurisdiction will, therefore, be given: See *Dominick v. State*, 40 Ala. 680, 91 Am. Dec. 496; *Hall v. State*, 134 Ala. 99, 32 South. 750; *Williams v. State*, 42 Ark. 35; *People v. Hughes*, 41 Cal. 234; *People v. Defoor*, 100 Cal. 150, 34 Pac. 642; *Davis v. People*, 22 Colo. 1, 43 Pac. 122; *Guenther v. People*, 22 Colo. 121,

45 Pac. 999; *Wilson v. State*, 24 Conn. 57; *Gully v. State*, 116 Ga. 527, 42 S. E. 790; *Durham v. People*, 5 Ill. (4 Scam.) 172, 39 Am. Dec. 407; *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621; *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69; *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772; *State v. Rosenbaum*, 23 Ind. App. 236, 77 Am. St. Rep. 432, 55 N. E. 110; *State v. Webber*, 76 Iowa, 686, 39 N. W. 286; *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *State v. Hornman*, 16 Kan. 452; *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Commonwealth v. Vaughn*, 101 Ky. 603, 42 S. W. 117; *Turner v. Commonwealth*, 19 Ky. Law Rep. 1161, 42 S. W. 1129; *State v. Faulkner*, 39 La. Ann. 811, 2 South. 539; *State v. Williams*, 45 La. Ann. 936, 12 South. 932; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Commonwealth v. Raby*, 12 Pick. 496; *Commonwealth v. McCauley*, 105 Mass. 69; *Sims v. State*, 66 Miss. 33, 5 South. 525; *State v. Moore*, 66 Mo. 372; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; *Territory v. Willard*, 8 Mont. 328, 21 Pac. 301; *State v. Sias*, 17 N. H. 558; *State v. McCormick*, 9 N. J. L. 152; *Burns v. People*, 1 Park. Cr. Rep. 182; *People v. Warren*, 1 Park. Cr. Rep. 338; *People v. McGowan*, 17 Wend. 386; *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472; *Price v. State*, 19 Ohio, 423; *State v. Stewart*, 11 Or. 52, 238, 4 Pac. 128; *State v. Howe*, 27 Or. 138, 44 Pac. 672; *Commonwealth v. Rockafellow*, 3 Pa. Super. Ct. Rep. 588; *Commonwealth v. Morgan*, 9 Kulp. 573; *Hilands v. Commonwealth*, 114 Pa. St. 372, 6 Atl. 267; *State v. Risher*, 1 Rich. 219; *State v. Glasgow*, Dud. (S. C.) 40; *Hite v. State*, 17 Tenn. (9 Yerg.) 357; *Thomas v. State*, 40 Tex. 26; *Williams v. State*, 13 Tex. App. 285, 46 Am. Rep. 237; *State v. Reiff*, 14 Wash. 664, 45 Pac. 318; *Winn v. State*, 82 Wis. 571, 52 N. W. 775; *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379; *United States v. Flecke*, 2 Ben. 456, Fed. Cas. No. 15,120; *Rex v. Vandercomb*, 2 Leach C. C. 708; *Rex v. Birchenough*, 1 Moody C. C. 477, 7 Car. & P. 575. See, also, monographic note to *Roberts v. State*, 58 Am. Dec. 537.

B. Criticism of Statement of Test.—It will be noticed that in the test as it was laid down by Buller, J., and as it is most frequently stated, it is said that if the facts alleged in the second indictment would not, if proved, warrant a conviction on the first indictment, a prior acquittal is no bar. There are, however, cases in which proof of the facts alleged in the second indictment would not convict under the first indictment, while proof of the facts alleged in the first indictment would convict under the second charge. If, in such a case, the test, as it is usually stated, is followed, we have the manifest absurdity of two indictments which may or may not charge the "same" offense accordingly as one is charged before or after the other.

This is well illustrated by the facts of two Iowa cases: *State*

v. Harris, 64 Iowa, 287, 20 N. W. 439; State v. Graham, 73 Iowa, 553, 35 N. W. 628. In both, there were two prosecutions, each prosecution under a different section of the code. Under one section (1542), it was unlawful to sell intoxicating liquors, or to keep them with intent to sell, while under the other section (1543) the offense was the sale or keeping, with intent to sell, in a building or place. It is obvious that the facts alleged in a prosecution under section 1543 would, if proved under a prosecution for a violation of section 1542, warrant a conviction, while the converse would not be true, since, in addition to the facts necessary to convict under section 1542, to warrant a conviction under section 1543, the further fact that the liquors were sold or kept for sale in a building is necessary. Under the test as usually given, the two prosecutions were for the "same offense," where the violation of section 1542 was first prosecuted, while for different offenses if the first prosecution was for a violation of section 1543. In both of the cases cited, it is true, the offenses were held different, although in one the order of prosecution was different than in the others; but it is difficult to see how they could have been held different in State v. Harris, 64 Iowa, 287, 20 N. W. 439, had the usual statement of the test been followed: See post, VI, q. 5.

In some few cases the usual statement of the test is reversed, and it is said that if the facts alleged in the first indictment would not convict under the second, the offenses are not the same: See, for instance, Bryant v. State, 97 Ga. 103, 25 S. E. 450. This change, where made, is, however, inadvertent, and simply changes the nature of the error in the test as usually stated, without removing it. A better statement of the test would seem to be that, unless the "facts alleged under either of the indictments would, if proved under the other, warrant a conviction under the latter," the offenses charged in the two are not the same. Compare statement by Gray, J., in Morey v. Commonwealth, 108 Mass. 433. Very similar to this is the test suggested by Chitty (1 Chitty on Criminal Law, 453): "As to the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other." See, however, for a case in which a distinction is made between an identity in the evidence sufficient to sustain both indictments, and an identity of facts alleged in both indictments, State v. Jesse, 20 N. C. (3 Dev. & B.) 98.

C. Depends on Facts Alleged, not on Evidence Offered.—Under this test it is the facts which are alleged in the two indictments, and not the testimony given in either, by which the identity of the offenses charged is to be determined. Accordingly, it is held immaterial that the evidence relied upon to support the second charge

was, in fact, introduced on the trial of the first. The criterion is not what testimony was introduced, but what might have been, and the determinative feature is whether the facts alleged in one charge would support a conviction under the other. Thus it is held that a conviction for keeping a shop open on a holiday is no bar to a prosecution for keeping a liquor nuisance, although the evidence which convicted on the first charge was ample to warrant a conviction under the second, and was the same as was relied on in the later prosecution: *Commonwealth v. Shea*, 80 Mass. (14 Gray) 386; nor is a conviction of being a common seller of liquor a bar to a prosecution for keeping a liquor nuisance, although both are to be sustained by the same testimony: *Commonwealth v. Hogan*, 97 Mass. 122. See, to the same effect, *Commonwealth v. Hudson*, 14 Gray, 11; *Commonwealth v. McShane*, 110 Mass. 502. Compare, also, *Commonwealth v. Tenney*, 97 Mass. 50; *State v. Nathan*, 5 Rich. 219. In some cases, however, this distinction is not observed: *People v. White*, 55 Barb. 606; *State v. Lindsay*, 61 N. C. (Phil.) 468; *State v. Stanley*, 49 N. C. (4 Jones) 290.

In the cases above cited, the two charges arose out of the same transaction, but the offenses charged differed in some respect. The cases, however, in which the question, perhaps, most frequently arises is where the offenses are of the same character, but are laid as having occurred at different times (as where different sales of liquors are charged, or where an offense in its nature continuous is charged to have been committed during different periods of time; and it is in this class of cases that it presents the most difficulty. For a discussion of the application of the test to such cases, see post, VI, f; V, g; VI, q.

2. "Same Transaction" Test.—In some few cases a test of identity, altogether different from that we have been considering, was suggested, the identity of the offenses being made to depend upon whether or not they arose out of the same transaction. Thus it was said in *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528: "To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps, more accurately expressed, viz., that the plea of *autrefois acquit* or *convict* is sufficient, whenever the proof shows the second case to be the same transaction with the first." Language pointing in the same direction is employed by the supreme court of Kentucky in *Reddy v. Commonwealth*, 97 Ky. 784, 31 S. W. 730. So far as this case tends to this view, however, it is opposed to the weight of authority in that state. (Compare *Baker v. Commonwealth*, 20 Ky. Law Rep. 879, 47 S. W. 864; *Commonwealth v. Vaughn*, 101 Ky. 603, 42 S. W. 117.) While in Georgia the "same transaction" test is, in the very recent case of *Gully v. State*, 116 Ga. 527, 42 S. E. 790, after an exhaustive review of the Georgia cases, held to be the rule of that state, it has been expressly rejected in

other states in several instances (*State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69; *Commonwealth v. Clair*, 7 Allen, 525), while in a greater number it has been disregarded entirely.

3. **"Gravamen" Test.**—So, also, it has been suggested in a few cases, that where the "gravamen" of both offenses is the same, a prosecution for both would be violation of the constitutional inhibition against putting twice in jeopardy for the same offense: *Wininger v. State*, 13 Ind. 540; *People v. Cox*, 107 Mich. 435, 65 N. W. 283. It is doubtful whether this can be said ever to have been advanced as a "test" of identity, and is too general to furnish any working criterion.

4. **Test of Identity Dependent upon Possibility of Joining Both Offenses in One Count.**—In his dissent from the opinion of the majority in *Wilson v. State*, 24 Conn. 57, Waite, C. J., lays it down as "a sound rule of law, founded upon the plainest principles of natural justice, that where a criminal act has been committed, every part of which may be alleged in a single count in an indictment, and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained upon each. And whenever there has been a conviction for one part, it will operate as a bar to any subsequent proceedings as to the residue." This was said in a case in which, after a prosecution for larceny, the accused was prosecuted for the burglary preceding the larceny. In this class of cases the "test," if it may be called such, given in the above quotation (i. e., whether the two offenses may or may not be charged in a single count) has been followed by some authorities: *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84; *State v. De Graffenreid*, 68 Tenn. (9 Baxt.) 287. See, also, *Commonwealth v. Lloyd*, 141 Pa. St. 28, 21 Atl. 411 (fornication and bastardy); and has been rejected by others: *People v. Parrow*, 80 Mich. 567, 45 N. W. 514, disapproving *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84. The rule can, however, be applied to but a limited class of the many cases in which the question of identity of offenses arises, and will hereafter be considered in discussing that class: See post, VI, n, 5.

c. Prosecution for Greater as Bar to Prosecution for Less Offense Included in It.

1. **General Rule.**—Omitting, for the present, the consideration of those cases in which the first prosecution is for a felony and the second for a misdemeanor, and where the doctrine of merger is involved (see post, VI, c. 3), it is plain that where a person is placed on trial for an offense which necessarily includes a lesser offense, and, on the trial of the former may be convicted of the latter, the prosecution for the greater offense will be a bar to any subsequent prosecution for the lesser. The first prosecution was, in fact, one

for both the greater offense and the lesser included in it; the accused might, on that trial, have been convicted of either charge, and to allow a subsequent prosecution for the lesser would obviously involve a double jeopardy on that charge: *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *State v. Keogh*, 13 La. Ann. 243; *Jones v. State*, 66 Miss. 380, 14 Am. St. Rep. 570, 6 South. 231; *Dinkey v. Commonwealth*, 17 Pa. St. 126, 55 Am. Dec. 542; *Commonwealth v. Bass*, 3 Lane. Law Rev. 278; *Davis v. State*, 43 Tenn. (3 Cold.) 77; *United States v. Wilson*, 7 Pet. 150; *In re Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672. Whether, if the plea be of a former conviction as distinguished from a former acquittal, it is necessary that on the trial for the greater a conviction of the lesser might be had, see post, V, h, 4.

2. Rule Applies Where Second Charge Includes Less Offense.—The rule that a prosecution for an offense which necessarily includes another of a lesser degree bars a subsequent prosecution for the lesser offense wherever the latter was a possible verdict on such former prosecution applies wherever the lesser offense is included in the second charge. To illustrate: if one is charged with assault with intent to ravish, and is subsequently prosecuted for assault with intent to kill, it is no answer to plea of former jeopardy to say that there could be no conviction of assault with one intent under an indictment for assault with an entirely different intent. On both, there could be a conviction for simple assault, and to prosecute for both would put the accused twice in jeopardy for that offense. A prosecution for an offense is, therefore, a bar to any subsequent prosecution for a lesser offense which it necessarily includes, or for any offense which likewise includes the lesser charge: See, as illustrating this principle, *People v. Defoor*, 100 Cal. 150, 34 Pac. 642; *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *Bell v. State*, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294; *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474; *State v. Chinault*, 55 Kan. 326, 40 Pac. 662; *Commonwealth v. McIlvain*, 17 Pa. Co. Ct. Rep. 174, 5 Pa. Dist. Rep. 175.

3. Effect of Doctrine of Merger of Offenses.—At the common law, however, one indicted for a felony could not be convicted of a misdemeanor although the proof might have showed that no felony was committed, and although all the elements of the misdemeanor were essentials of the felony. The reason for the rule, as stated in the principal case (*People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006), was that "persons indicted for a misdemeanor had certain advantages or privileges, among others, that of making full defense by counsel, which those charged with a felony did not have": See, also, monographic note to *Whittford v. State*, 5 Am. St. Rep. 899. As is there stated, the rule was changed in England by Lord Denman's act (1837—Stats. 1 Viet., c. 85, sec. 11), and has been changed

in many, if not most, of the states in this country, the abolition of the distinctions which gave reason for the doctrine at common law having now left no reason for its further existence. When, therefore, on a prosecution for a felony there may be a conviction of an ingredient misdemeanor, there cannot be a subsequent prosecution for the misdemeanor: *Henry v. State*, 33 Ala. 389; *Moore v. State*, 71 Ala. 307; *State v. Hall*, 50 Ark. 28, 6 S. W. 20; *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *Franklin v. State*, 85 Ga. 570, 11 S. E. 876; *Hilands v. Commonwealth*, 114 Pa. St. 372, 6 Atl. 267; *State v. Smith*, 43 Vt. 324. Compare, however, *State v. Hattabaugh*, 66 Ind. 223; *Commonwealth v. Roby*, 12 Pick. 496.

d. Prosecution for Less Offense as Bar to Prosecution for Greater Offense Including It.

1. General Rule.—In a number of early cases, it is said that while a prosecution for a greater offense which includes a less is a bar to a subsequent prosecution for the less, the converse of this is not true, and a prosecution for the less will not bar a subsequent prosecution for the greater offense in which it is included. "A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the accused stands indicted. It follows that a conviction or acquittal for a minor offense is no bar to a prosecution for a greater offense": *State v. Foster*, 33 Iowa, 525. (Compare *State v. Murray*, 55 Iowa, 530, 8 N. W. 350.) To the same effect, see *State v. Farrand*, 1 Root, 446; *Hurd v. State*, 2 Root, 186; *Wilson v. State*, 24 Conn. 57; *Boswell v. State*, 20 Fla. 869; *State v. Gapen*, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *Scott v. United States*, *Morris* (Iowa), 142; *Commonwealth v. Reed*, 4 Lanc. (Pa.) 89. The reasons assigned are that while the greater may include the less, the less cannot include the greater, and that a rule allowing the less to bar the greater would be to allow criminals to escape merited punishment by submitting to conviction on a trivial charge.

Both reason and authority oppose this view. The defendant is put in jeopardy twice for the lesser offense quite as certainly where a prosecution for the greater, which includes the lesser, follows a prosecution for the lesser offense, as where this order is reversed. So far as the danger of offenders escaping punishment by collusion is concerned, it is sufficient to say that the state is the party making the election of what charge it will prosecute, and any showing that the former prosecution was had with the collusion of the defendant prevents its having any effect to bar subsequent proceedings: *Bishop's Criminal Law*, sec. 1008. The greater weight of authority, moreover, supports the doctrine that a prosecution for a less offense necessarily included in a greater offense furnishes a bar to a subsequent prosecution for the greater whenever, at least, the defendant could

be convicted of the lesser offense on an indictment for the greater. A conclusive reason for this, as is said in *Moore v. State*, 71 Ala. 307, is that where tried for the smaller offense, and afterward put on trial for the larger, the accused is twice in jeopardy for the smaller offense: See, also, *Storrs v. State*, 129 Ala. 101, 29 South. 778; *State v. Blevins*, 134 Ala. 213, 32 South. 637; *Southworth v. State*, 42 Ark. 270; *State v. Smith*, 53 Ark. 24, 13 S. W. 391; *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642; *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *State v. Parmelee*, 9 Conn. 259; *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181; *Franklin v. State*, 570; *Bell v. State*, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294; *State v. Gleason*, 56 Iowa, 203, 9 N. W. 126; *Williams v. Commonwealth*, 102 Ky. 381, 43 S. W. 455; *State v. Keagh*, 13 La. Ann. 243; *Commonwealth v. Squire*, 42 Mass. 258; *Commonwealth v. Cunningham*, 13 Mass. 245; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *State v. Hatcher*, 136 Mo. 641, 38 S. W. 719; *People v. Purcell*, 16 N. Y. Supp. 199; *Commonwealth v. Arner*, 149 Pa. St. 35, 24 Atl. 83; *Herera v. State*, 35 Tex. Cr. Rep. 607, 34 S. W. 943. See, also, monographic note to *Roberts v. State*, 58 Am. Dec. 544.

2. Effect of Doctrine of Merger of Offenses.—As we have seen, on an indictment for felony at common law, one could not be convicted of a misdemeanor (*supra*, V. c. 3). Conversely, if charged with misdemeanor, on proof that a felony had been committed, the defendant could not be convicted of the misdemeanor, but must be acquitted. This rule had its limitations (*Rex v. Button*, 3 Cox C. C. 229), but as a result of the general rule it is held in those cases in which the old doctrine of merger is maintained that a prosecution for a misdemeanor constitutes no bar to a subsequent prosecution for a felony: See, for instance, *State v. Nichols*, 38 Ark. 550 (compare *State v. Hall*, 50 Ark. 28, 6 S. W. 20; *State v. Hattabaugh*, 66 Ind. 223; *Hodges v. State*, 45 Tenn. (5 Cold.) 7 (overruled in *Mikels v. State*, 50 Tenn. (3 Heisk.) 321). The considerations which gave rise to the doctrine have, however, now ceased to exist, and in most jurisdictions a conviction for a lesser offense is generally held a bar to a prosecution for a greater offense including it, regardless of any distinction of misdemeanor and felony: *Bell v. State*, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294; *Reddy v. Commonwealth*, 97 Ky. 784, 31 S. W. 730; *Commonwealth v. Squire*, 42 Mass. 258; *Mitchell v. State*, 42 Ohio St. 383; *Commonwealth v. Morgan*, 9 Kulp, 573; *Thomas v. State*, 40 Tex. 36; *State v. Smith*, 43 Vt. 324; *Regina v. Elvington*, 9 Cox C. C. 86; *Rex v. Walker*, 2 Man. & R. 446. See, also, in this connection, *People v. Arnold*, 46 Mich. 268, 9 N. W. 406, and V. d. 4.

3. Where Court Trying Less Offense had no Jurisdiction Over Greater.—In a number of the cases in which it is held that a prosecution for an offense furnishes no bar to a subsequent prosecution

for a greater offense in which it is included, especially where the lesser offense is a misdemeanor and the higher a felony, stress is laid upon the fact that the court in which the former prosecution was had had no jurisdiction of the greater offense: See, for instance, *Boswell v. State*, 20 Fla. 869; *Reddy v. Commonwealth*, 97 Ky. 784, 31 S. W. 730; *State v. Gustin*, 152 Mo. 108, 53 S. W. 421; *Hodges v. State*, 45 Tenn. (5 Cold.) 7 (overruled in *Mikels v. State*, 50 Tenn. (3 Heisk.) 321). The fact that the court trying one offense had not jurisdiction of the other does not, however, seem material. As is said in the principal case (*People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006, quoting from *Bishop's Criminal Law*, section 1058): "It has been supposed that if the tribunal trying the less offense has no jurisdiction over the higher, the case will be different; yet there does not seem to be any just foundation for this distinction. The fact that one has been in jeopardy for a lower offense is true equally whether the court had authority to try the higher or not": See, to the same effect, *Commonwealth v. Bosworth*, 113 Mass. 200, 18 Am. Rep. 467. See, also, post, V, d, 4.

In *State v. Hattabaugh*, 66 Ind. 223, it is held that where one formerly convicted on a lower offense is afterward charged with a higher, in which the former offense is included, but of which the court trying the first charge had no jurisdiction, the plea of *autrefois acquit* or *autrefois convict* admits the guilt of the defendant of the charge in the second indictment (relying on *People v. Saunders*, 4 Park. Cr. Rep. 196). If, therefore, the higher offense be a felony and the lower a misdemeanor, it is argued that under the doctrine of merger, where that doctrine is recognized, the defendant, by admitting his guilt of a felony, shows that he could not lawfully have been convicted on the misdemeanor charge. However this may be, where, on the misdemeanor charge, he was acquitted (since the acquittal may have been because a felony was proved and conviction for a misdemeanor thus made impossible), it would seem that where there was a conviction on the misdemeanor charge, there was necessarily an adjudication that no felony had been committed, and that this should control as against any constructive admission (if there be one) of guilt on the felony charge implied from the plea of former jeopardy: See, in this connection, *State v. Murray*, 55 Iowa. 530, 8 N. W. 350; *Commonwealth v. Bosworth*, 113 Mass. 200, 18 Am. Rep. 467; *Nelson, J.*, dissenting in *Mikels v. State*, 50 Tenn. (3 Heisk.) 321. Whether, moreover, there is such a constructive admission of guilt involved in the plea may well be doubted.

4. View that Prosecution for Less Offense is Bar Only to Verdict for Less on Trial for Greater.

A. In General.—In *Commonwealth v. Robinson*, 126 Mass. 259, 30 Am. Rep. 674, it is said: "An offense is in its nature indivisible. It may consist of a series of acts, but that series of acts constitutes

but one offense. It may not only require a series of acts, but a duration of time, to constitute the offense, but when the acts and the trial are properly proved, the offense is single and indivisible. There is no such thing known in law as a judgment of conviction or acquittal being a bar to part of an offense. It must be a bar to the whole, or it is of no value." Nevertheless, the cases in which a former prosecution for a less offense is (see *supra*, 11) held to constitute no bar to a subsequent prosecution for a greater offense in which the former charge is necessarily included have reached a compromise with the contrary view, by holding the former prosecution a bar to such a part of the second charge as was included in the first charge. Thus, while, under the doctrine of these cases, a prosecution and conviction for the misdemeanor, assault and battery, is no bar to a prosecution on the same state of facts for a felony, assault with intent to murder (for instance), it is a bar to a conviction for assault and battery on the second charge: See *State v. Nichols*, 38 Ark. 550; *Boswell v. State*, 20 Fla. 869; *State v. Hattabaugh*, 66 Ind. 223; *Bryant v. State*, 72 Ind. 400; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Mikels v. State*, 50 Tenn. (3 Heisk.) 321 (overruling *Hodges v. State*, 45 Tenn. (5 Cold.) 7); *Prine v. State*, 41 Tex. 300. Compare, also, *State v. Martin*, 76 Mo. 337.

B. By Statute.—By statute in Texas it is provided that "a former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense": Rev. Stats.; Code Cr. Proc., art. 553. Under this it is held that where the charge was made upon a complaint before a justice of the peace, it bars subsequent prosecution only for such grades of the offense as the justice had jurisdiction over: *White v. State*, 9 Tex. App. 390; *Henkel v. State*, 27 Tex. App. 510, 11 S. W. 671; *Thirsty Davis v. State*, 39 Tex. Cr. Rep. 681, 44 S. W. 1099; but if made upon indictment or information, it bars all subsequent prosecutions, although for a higher grade of the offense: *White v. State*, 9 Tex. App. 390. In any case, however, if the verdict on the second prosecution, whatever the charge, was for no higher an offense than that charged in the former complaint or indictment, the prior jeopardy is an effective bar to such verdict: *White v. State*, 9 Tex. App. 390; *Reagan v. State* (Tex. Cr. App.), 51 S. W. 914; *Funderburk v. State* (Tex. Cr. App.), 64 S. W. 1059.

e. Prior Acquittal for Variance.

1. General Rule.—The test by which, as we have seen, the identity of offenses may, in most cases, be determined is whether the facts alleged in one charge, if proved under the other, would warrant a conviction. Applying this to the case where, after a defendant

has been placed on trial on a charge and acquitted because of a material variance between the indictment and the proof, he is again placed on trial on an indictment correctly alleging the facts as they exist, it is evident that the former prosecution constitutes no bar to the latter. It is, indeed, because the facts alleged in one indictment would not convict under the other that the second charge was rendered necessary. Where, therefore, it appears from the plea or the proof that on the former trial the acquittal was because of a material variance between *allegata* and *probata*, as where the ownership of the goods charged to have been stolen was wrongly alleged, or it appears that an offense charged to have been committed against one person was in fact committed against another, a subsequent indictment based upon the facts as proved will not be barred by a plea of former jeopardy. The offenses charged are obviously not the same: *Martha v. State*, 26 Ala. 72; *People v. Hughes*, 41 Cal. 234; *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; *Gully v. State*, 116 Ga. 527, 42 S. E. 790 (attempting to distinguish *Buhlers v. State*, 64 Ga. 504; *Goode v. State*, 70 Ga. 752; *Knight v. State*, 73 Ga. 804, and doubting *Knox v. State*, 89 Ga. 259, 15 S. E. 308); *Guedel v. People*, 43 Ill. 226; *Reffe v. Commonwealth*, 21 Ky. Law Rep. 1331, 56 S. W. 265; *State v. Malone*, 28 La. Ann. 80; *State v. Williams*, 45 La. Ann. 936, 12 South. 932; *Commonwealth v. Wade*, 17 Pick. 395; *Commonwealth v. Clair*, 89 Mass. (7 Allen) 525; *Commonwealth v. Chesley*, 107 Mass. 223; *Sims v. State*, 66 Miss. 33, 5 South. 525; *State v. Sullivan*, 9 Mont. 490, 24 Pac. 23; *Cariter v. People*, 1 Abb. Dec. 305; *State v. Birmingham*, 44 N. C. (Busb.) 120; *State v. Revels*, 44 N. C. (Busb.) 200; *Price v. State*, 19 Ohio, 423; *State v. Huffman*, Addis. (Pa.) 140; *Commonwealth v. Trimmer*, 84 Pa. St. 65; *State v. Risher*, 1 Rich. 219; *State v. Jenkins*, 20 S. C. 351; *State v. Brown*, 33 S. C. 151, 11 S. E. 641; *State v. Council*, 58 S. C. 368, 36 S. E. 663; *Hite v. State*, 17 Tenn. (9 Yerg.) 357; *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435; *Nance v. State*, 17 Tex. App. 385; *Wheelock v. State* (Tex. Cr. App.), 38 S. W. 182; *Burress v. Commonwealth*, 27 Gratt. 934; *Robinson v. Commonwealth*, 32 Gratt. 866; *Commonwealth v. Mortimer*, 2 Va. Cas. 325; *State v. Dudley*, 7 Wis. 664; *United States v. Book*, 2 Cranch C. C. 294, Fed. Cas. No. 14,624, and monographic note to *Roberts v. State*, 58 Am. Dec. 537-539.

Where, in one charge, the ownership of goods or some other material averment is stated as relating to "persons unknown," while in the other charge a certain person is named, if the former acquittal was because of the fact that contrary to the averments of the indictment the party was known, the case is simply the ordinary one of a material variance on the first charge, and there is no bar. *State v. Revels*, 44 N. C. (Busb.) 200; *State v. Birmingham*, 44 N. C. (Busb.) 120; *Robinson v. Commonwealth*, 32 Gratt. 866. Where, however, such was not the case, and the name of the party was actually unknown, after an acquittal upon an indictment charging lar-

convy from or murder of a "person unknown," the accused cannot, it is held, be subjected to another prosecution on an indictment specifying the name of such party, merely because the name of the party is afterward ascertained: *Fenton v. State*, 23 Tex. Cr. Rep. 633, 23 S. W. 537. See, also, *Hite v. State*, 17 Tenn. (9 Yerg.) 357; *State v. Wiseback*, 139 Mo. 214, 40 S. W. 946.

2. **Immaterial Variance.**—In order that a prosecution be not barred by a prior prosecution in which there was an acquittal because of variance, this variance must be material. If it is not material, as where the time is differently alleged in the two indictments (time not being a material averment ordinarily), the facts alleged in one would be sufficient to convict under the other, and the two indictments are in every legal sense for the same offense. The fact that the court on the former trial believed the variance material does not affect the case: *People v. Terrill*, 132 Cal. 497, 64 Pac. 894 (immaterial variance in description of forged note); *Durham v. People*, 5 Ill. (4 Scam.) 172, 39 Am. Dec. 407 (immaterial variance in name of parties intended to be defrauded); *Gaskins v. Commonwealth*, 97 Ky. 494, 30 S. W. 1017 (charged in one indictment as principal, in other as present, aiding and abetting); *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210 (charging bigamy in one indictment by marrying M. W., in other by marrying M. S., where the party went under both names); *State v. Copeland*, 46 S. C. 13, 23 S. E. 980 (immaterial variance in laying ownership of barn burned by defendant); *Morrison v. State*, 38 Tex. Cr. Rep. 392, 43 S. W. 113 (immaterial variance in charging metal of which instrument was made); *Rex v. Clark, Brod. & B.* 473 (immaterial variance in mode of killing). See, also, *State v. Pujo*, 41 La. Ann. 346, 6 South. 339; *State v. Moore*, 66 Mo. 372, and cases cited in monographic note to *Roberts v. State*, 58 Am. Dec. 537-539.

In *People v. Meakin*, 61 Hun, 327, 15 N. Y. Supp. 917, under a section of the Code of Criminal Procedure of New York (340) to effect that "if the defendant were formerly acquitted on the ground of a variance between the indictment and the proof . . . it is not deemed an acquittal of the same offense," it is held that if on the former trial the defendant has claimed the variance to be material and thus secured an acquittal, he cannot, on the second trial, reverse his position, and, by showing the variance to be in fact immaterial, make his plea of former acquittal effective. "Whether the variance referred to was or was not material, we think the defendants cannot now be permitted to question the position which they took upon that head on the former trial." On the other hand, where, under such a statute, it does not appear that the former acquittal was because of the variance, the mere fact that the indictment was defective, or that there was such a variance, does not deprive the defendant of immunity from subsequent prosecution where the former trial was in fact upon the merits: *Croft v. People*, 15 Hun, 484.

f. "Carving" or "Splitting" Offenses.

1. **In General.**—We have already seen, and, in applying the general principles to specific offenses, we shall hereafter see in still a larger number of instances, that the same act may give rise to a number of "offenses." Selling liquor to a minor without a license and on Sunday is but one act, and yet by the fine discrimination of the law it may constitute several offenses. It may violate a statute against selling liquor without a license, another against selling liquor on Sunday, another against selling liquor to a minor, and, as various other facts appear, may offend against still other laws. The same act here has several different aspects, and each aspect may constitute the basis of a prosecution. But the same "offense" cannot be split into many parts and made the subject of innumerable prosecutions. A theft of one thousand dollars is one theft and not a thousand thefts, and the accused can be prosecuted but once for that offense. The fact that the first prosecution was for less than the entire amount stolen can make no difference. The prosecution cannot thus split up into an indefinite number of charges what was in fact but one act and offense.

2. Larceny of Several Articles.

A. General Rule.—The instance above given, of the larceny of several articles at one time and place and by one act of theft, is one of frequent occurrence in the authorities. In such a case, by the great weight of authority, there is but one offense. The state may, if it sees fit, prosecute for the theft of all the articles at once, or it may select what it wishes and prosecute for the larceny of that part, but it cannot split the single larceny into as many charges as there were articles stolen and make of such charges the basis of successive prosecutions. The second and subsequent prosecutions are, then, for the "same offense" as was the first: *Foster v. State*, 39 Ala. 229; *Jackson v. State*, 14 Ind. 327; *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69; *State v. Gapen*, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *State v. Egglesht*, 41 Iowa 574, 20 Am. Rep. 612; *Fisher v. Commonwealth*, 64 Ky. (1 Bush) 211, 89 Am. Dec. 620; *State v. Augustine*, 29 La. Ann. 119; *Commonwealth v. Bosworth*, 113 Mass. 200, 18 Am. Rep. 467; *Larton v. State*, 7 Mo. 55; *State v. McCormack*, 8 Or. 236; *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *Quitow v. State*, 1 Tex. App. 47, 28 Am. Rep. 396; *Hudson v. State*, 9 Tex. App. 151, 35 Am. Rep. 732; *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432; *United States v. John*, 4 Cranch C. C. 336, Fed. Cas. No. 15,479; *United States v. Lee*, 4 Cranch C. C. 446, Fed. Cas. No. 15,586. There is, however, not an entire unanimity of authority upon this point: *Regina v. Breetel*, 1 Car. & M. 609. Compare, also, *United States v. Harmison*, 3 Saw. 556, Fed. Cas. No. 15,308. (As to a

distinction between the pleas of autrefois convict and autrefois acquit in this connection, see post, V, h, 2.)

B. Where Owned by Several Persons.—In a number of cases a distinction is attempted where the various articles taken at one time and place belong to several persons. According to these cases, the larceny of the goods of each person constitutes in law a distinct offense. Proof of the larceny of the goods of one could not, they argue, be given under an indictment charging larceny of the goods of another, and, therefore, under the test ordinarily employed, the offenses are not the same: See, as to this, post, V, g, 2. B; *Freeland v. People*, 16 Tenn. (6 Pick.) 380; *Commonwealth v. Hoffman*, 121 Mass. 369; *State v. Bynum*, 117 N. C. 749, 23 S. E. 218; *State v. Bynum*, 117 N. C. 752, 23 S. E. 219; *State v. Thurston*, 2 McMull. (S. C.) 382; *United States v. Beerman*, 5 Cranch C. C. 412, Fed. Cas. 14,560. Compare, also, *Phillips v. State*, 85 Tenn. 551, 3 S. W. 434. The better reason and the weight of authority is that the circumstance of different ownerships does not convert one taking into several larcenies: *Egglesht v. State*, 41 Iowa, 574, 20 Am. Rep. 612; *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179, and cases cited in preceding paragraph. This is well brought out by the language of the opinion in *Ackerman v. State*, 7 Wyo. 504, 54 Pac. 228, in which the court quotes the following from *United States v. Beerman*, 5 Cranch C. C. 412, Fed. Cas. No. 14,560. "The gist of the offense [larceny] is the violation done to the right of property of the injured individual, which it is the duty of the government to protect. The injury done to the right of property of A is not an injury to the right of property of B. Both are injured, and each has an equal right to punish the offender." To this the Wyoming court gives the following answer. "It is hardly necessary to say that this is not the theory of the criminal law at all. Larceny is an offense against the public, and it is this which the state undertakes to prosecute and punish. It does not undertake by the penalties of the criminal law to redress private injuries. It punishes an act, done with a certain criminal intent, as a violation of the public law. If the property was all taken at the same time, it is one offense whether the goods belonged to one person or to several." (For a possible distinction between the effect of an acquittal of the larceny of the goods of one owner, and conviction for the same, as a bar to a subsequent prosecution for the larceny of the goods of another taken at the same time, see, post, V, h, 2.)

C. Where Taking of Different Articles is Covered by Separate Statutes.—This rule against the splitting of a single larceny is not affected by the fact that the larceny of certain of the articles taken is prohibited by a different statute from that which provides against the larceny of the other articles or is subject to greater

punishment. Thus, although "horse stealing" may be an offense distinct from larceny generally, if by the same act one steals a horse and a saddle, or a horse and wagon, there is but one larceny and the state cannot prosecute separately and successively for "horse stealing" and for larceny of the wagon or of the saddle: *Fisher v. Commonwealth*, 64 Ky. (1 Bush) 211, 89 Am. Dec. 620; *State v. McCormack*, 8 Or. 236.

D. By Several Acts (or Takings).—The prohibition against splitting offenses, as respects larceny, has, however, no legitimate application where there were in fact two takings. Where this is the case there are two separate offenses, and the accused may be punished for either or for both, whether the goods belong to the same or different persons. Thus, if cattle are taken at different times and places, although in one "roundup," each taking is a distinct and complete crime, and may be made the subject of a separate prosecution: *State v. English*, 14 Mont. 399, 36 Pac. 815; *Stevens v. State* (Tex. Cr. App.), 58 S. W. 96; *Willis v. State*, 24 Tex. App. 586, 6 S. W. 857; *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432. See, also, in this connection, *Williams v. State*, 13 Tex. App. 285. So goods may be taken from the same room, but so far apart that the larceny of each is a separate offense: *Phillips v. State*, 85 Tenn. 551, 3 S. W. 434; or the same result may follow where the several articles are taken from different rooms: See *Hudson v. State*, 9 Tex. App. 151, 35 Am. Rep. 732. This principle may explain *State v. Bynum*, 117 N. C. 749, 23 S. E. 218, and *State v. Bynum*, 117 N. C. 752, 23 S. E. 219, although the language of these cases would seem to indicate that the circumstance of the goods belonging to different persons (rather than the fact that the takings were separable) was there regarded as controlling: See supra, V, f, 2, B.

An interesting question in this connection was presented in *Harrington v. State*, 31 Tex. Cr. Rep. 577, 21 S. W. 356. In that case the defendant had stolen cattle at different times and places in A county, and had driven them at one time into B county. Having been prosecuted and convicted in B county for the theft of one lot of cattle, he pleaded this former conviction to a subsequent prosecution in the same county for the theft of another portion of the cattle. The defendant's contention was that, however numerous the thefts in A county, the bringing the cattle into B county was a new larceny, and being single and indivisible, could not be "split" into several charges. The court held, however, that the doctrine that there was a new larceny on bringing the stolen cattle into another county was a mere fiction, invented to settle the venue in cases of larceny, and therefore that the former conviction furnished no bar to the subsequent prosecution. (Compare *Commonwealth v. Andrews*, 2 Mass. 409.)

3. Assault or Killing of Several.

A. By One Act or Blow.—The application of the rule against splitting a single offense into parts and prosecuting for each part has in no connection given rise to more difficulty or conflict than in those cases where by a single act a person has assaulted, or caused the death of, two or more persons. According to one line of cases an assault on two or more persons, although by one and the same stroke, is in law an assault upon each, and a prosecution for the crime against one is no bar to a subsequent prosecution for the assault upon the others. Thus it was held in *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472, that a prosecution for assault and battery on N. R. is not barred by a prior acquittal of assault on A. S., although the same shot struck both. (This does not seem to be the fact in the case, however, two shots having been fired.) See to the same effect, *People v. Warren*, 1 Park. Cr. Rep. 338; *State v. Sonnerkalb*, 2 Nott & McC. 280; *Vaughan v. Commonwealth*, 2 Va. Cas. 273. (Compare, also, *State v. Robinson*, 12 Wash. 491, 41 Pac. 884.) So in *Winn v. State*, 82 Wis. 571, 52 N. W. 775, an acquittal of the murder of A was held no bar to a prosecution for assault with intent to murder B, although the two offenses were based upon the firing of the same shot.

On the other hand, the view is taken by as many, if not more, of the authorities that one act, if it injures two persons, does not thereby become two offenses, and a prosecution for an assault upon or the killing of one of the injured persons bars any subsequent prosecution based upon the same act. Thus it was held in *State v. Damon*, 2 Tyler (Vt.), 387, that if by the same stroke a defendant wounds two persons, a conviction of assault and battery upon one of them is a bar to a subsequent prosecution for the assault and battery on the other. This case has been attempted to be distinguished as being one where both prosecutions were for the same "breach of the peace" (see *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597), and has been declared to be opposed to the weight of authority and reason: See *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472. Whether the attempted distinction be valid or not, the case has been followed in a number of instances as prohibiting a double prosecution where one act injures several persons, and it is more than doubtful whether such a conclusion is not supported "by the weight of authority and reason": See *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17, 20 South. 632; *Sepple v. People*, 10 Ill. App. 144; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Sadberry v. State*, 39 Tex. Cr. Rep. 466, 46 S. W. 639. Compare, also, *Carson v. People*, 4 Colo. App. 463, 36 Pac. 551. In *Ashton v. State*, 31 Tex. Cr. Rep. 482, 21 S. W. 48, it is said that "the true test in such cases must be, that if the intent to kill the one is an intention formed and existing distinct from, and independent of, the intention to kill the other, the two acts

cannot constitute a single offense." Compare language of Stone, C. J., dissenting, in *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79, 6 South. 120, and of Waite, C. J., dissenting, in *Wilson v. State*, 24 Conn. 57, 71. As to a possible distinction between the pleas of autrefois acquit and autrefois convict in this connection, see post, V, h, 2.

B. By Several Acts or Blows but in Same Transaction or Affray. The rule is, however, to be strictly confined to the case where the same act occasions both injuries or deaths. The fact that the injuries were both inflicted in the same affray or other criminal transaction is not sufficient. The volition must be identical. If one shot is fired and injures two people, there is, as we have seen, a conflict of authority as to the possibility of separate and successive prosecutions. But where several shots are fired, each injuring one person, the mere propinquity in point of time or action, of the two assaults does not make them a single assault, and all the authorities agree in holding that there may in such a case be as many prosecutions as there were assaults. Thus, several assaults may occur in a train holdup: *Taylor v. State* (Tex. Cr. App.), 55 S. W. 961; *Keaton v. State* (Tex. Cr. App.), 57 S. W. 1125. Nor is proof that two persons were killed at the same point of time equivalent to proof that they were killed by the same act: *People v. Majors* (Cal.), 2 Pac. 744, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597. For other instances of injuries to several in the same affray, or at about the same point of time, where the assaults or homicides were held severable and distinct offenses, all of which might be prosecuted, see in addition to cases above cited, *State v. Standifer*, 5 Port. 523; *McCoy v. State*, 46 Ark. 141; *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224, 22 Pac. 820; *Crocker v. State*, 47 Ga. 568; *Greenwood v. State*, 64 Ind. 250; *Baker v. Commonwealth*, 20 Ky. Law Rep. 879, 47 S. W. 864; *State v. Vines*, 34 La. Ann. 1079; *People v. Ochotski*, 115 Mich. 601, 73 N. W. 889; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Jones v. State*, 66 Miss. 380, 14 Am. St. Rep. 570, 6 South. 231; *State v. Parish*, 8 Rich. 322; *Ashton v. State*, 31 Tex. Cr. Rep. 482, 21 S. W. 48; *Augustine v. State* (41 Tex. Cr. App. 59), 52 S. W. 77; *State v. Robinson*, 12 Wash. 491, 41 Pac. 884; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792; *Ashton v. State*, 31 Tex. Cr. Rep. 482, 21 S. W. 48.

4. Possession of Several Forged Instruments with Intent to Utter. Another instance of the application of the rule against splitting one offense into several parts occurs where the defendant is in possession of several forged instruments or counterfeiting plates. Such possession constitutes, it is held, but one offense, and not as many distinct offenses as there are instruments. A prosecution for having possession of one of such instruments is, therefore, a bar to any subsequent prosecution based upon the possession of the others: *State v. Benham*, 7 Conn. 414; *People v. Van Keuren*, 5 Park.

Cr. Rep. 66; *United States v. Miner*, 11 Blatchf. 511, Fed. Cas. No. 15,780. (Compare, however, *Van Houten's Case*, 2 City Hall Recorder (N. Y.) 73.)

5. **Uttering Several Forged Instruments at One Time.**—Similarly, it is held that where several forged or counterfeit instruments are uttered at one time, by the same act, it is but one offense and there can be but one prosecution thereon. "If A should at one time, and as one act, hand to a merchant four counterfeit bills, each of the denomination of five dollars, and have the amount passed to his credit, and B should in like manner pass one bill of the denomination of twenty dollars, we would much doubt whether 'the perfection of human reason' would be evinced in sending B to the penitentiary ten years for one crime, and A forty years for four crimes. . . . We think the decided weight of reason and of authority supports the position that when defendant by one muscular action and one volition passed to the bank in question four forged checks, and procured them to be placed to his credit, he committed one crime, and not four": *State v. Eggesht*, 41 Iowa, 574, 20 Am. Rep. 612. To the same effect, see *State v. Benham*, 7 Conn. 414; *State v. Moore*, 86 Minn. 422, 90 N. W. 789; *People v. Van Keuren*, 5 Park. Cr. Rep. 66; *Barton v. United States*, 23 Wis. 587. (Compare *United States v. Randenbush*, 8 Pet. 288.) *Nichols v. State*, 39 Tex. Cr. Rep. 80, 44 S. W. 1091, is opposed to the view of these courts, but may perhaps be explained by a distinction which obtains in the courts of Texas as to prior acquittal and prior conviction in cases of this character: See post, V, h, 2. Where the several instruments were uttered at different times, each act is, of course, in itself a separate offense: *Bucks v. State*, 24 Tex. App. 326, 6 S. W. 300.

6. **Other Instances.**—It is held that where there is a statute prohibiting the opening of a place of business for trading on Sunday, such opening and doing business is but one offense, however many sales are made, and there can be but one prosecution therefor. That different sales are alleged in the several indictments does not make the offenses different: *Commonwealth v. Moses*, 3 Laek. Jur. 335, 15 Pa. Co. Ct. Rep. 224 (relying on *Friedebom v. Commonwealth*, 113 Pa. St. 242, 57 Am. Rep. 464, 6 Atl. 160); *Creppe v. Durden*, 2 Cowp. 640. Contra, *State v. Heard*, 107 La. 60, 31 South. 384. So the prosecution of a defendant for permitting one person to be in his (defendant's) saloon during prohibited hours is a bar to a prosecution for allowing another person to do the same, where it appears that the two were together: *State v. Rosenbaum*, 23 Ind. App. 236, 77 Am. St. Rep. 432, 55 N. E. 110; a prosecution for introducing a file into jail, whereby a misdemeanor prisoner was enabled to escape, bars a subsequent prosecution for thereby enabling a felony prisoner to escape, although the offense first charged against defendant was but a misdemeanor, while the latter is a felony: *Hurst*

v. State, 86 Ala. 604, 11 Am. St. Rep. 79, 6 South. 120. Similarly, a charge of arson in burning one building and a prosecution thereunder will support a plea of former jeopardy if the defendant is subsequently charged with burning a dwelling-house, where the same fire destroyed both: State v. Emerson, 53 N. H. 619, and one offense cannot be split into two parts by charging in one indictment arson with respect to a mill, and in the other arson with respect to books of account which were in the mill at the time: State v. Colgate, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346.

In *People v. Stephens*, 79 Cal. 428, 21 Pac. 856, it is held that there can be but one prosecution for criminal libel where in one publication the defendant made several defamatory statements concerning another. Where, on the other hand, two persons were slandered, although apparently in one sentence, it has been held that an acquittal on the charge of slandering one is no bar to a prosecution for the slander of the other: *Collins v. State*, 39 Tex. Cr. Rep. 30, 44 S. W. 846; and in *Smith v. Commonwealth*, 7 Gratt. 593, it was held that a conviction for advising one slave to abscond is no bar to a prosecution for advising another slave to do the same, although the advice was given to both at the same time and by the same words and acts.

See as to splitting offenses which are continuous in their nature, post, VI, f.

g. Conclusiveness of Test of Identity.—From the foregoing discussion of the general principles relating to the identity of offenses, it is quite evident that the test of identity ordinarily adopted is by no means infallible. Inasmuch, however, as a test is valuable only in so far as it furnishes a basis of determination which is of general applicability, it becomes important to determine when it is to be regarded as conclusive and when not.

1. When Conclusive.

A. Identity of Legal Nature of Offenses.—In order, as we have seen, that one prosecution can be said to be for the same offense as another, it must be for the same "act and offense," or "for the same offense in law and in fact." This identity is, therefore, to a certain extent a mixed one of law and of fact. The act which gave rise to the two charges must be one and the same, and the legal nature of the crimes charged must be the same. In this latter connection, the test seems sufficient. To determine whether the offenses are of the same species in law, whether a prosecution for larceny should bar a prosecution for embezzlement, or a prosecution for burglary should bar one for larceny, perhaps as good a criterion as any is whether or not the facts alleged in the one indictment would, if proved under the other, warrant a conviction. If not, the two offenses can hardly be said to be the same in point of law: See, for instance, *Wilson v. State*, 24 Conn. 57; *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923.

B. Identity of Offenses in Point of Fact.—So, as regards the identity of the transactions in point of fact (i. e., whether the same act of wrongdoing is referred to in both charges), where their identity in their legal nature is admitted, the test may, in a certain class of cases, be conclusive of their dissimilarity. Such a case is *Reg. v. Taylor*, 3 Barn. & C. 502. In bar of a prosecution for keeping a gaming-house in the second year of the reign of the present king, defendant there pleaded an acquittal of the charge of keeping a gaming-house in the fifty-seventh year of the reign of the late king. The court held that the offenses could not in point of fact have been the same, since the proof on the former indictment must necessarily have been confined to the proof of offenses committed in the reign of the late king: Compare, also, *State v. Welber*, 76 Iowa, 686, 39 N. W. 286. The cases which fall within this class, and in which the test can be said to conclusively determine the identity of the offenses in point of fact, are not, however, numerous.

2. When Inconclusive.

A. In General.—Ordinarily, the test is not conclusive as to the identity or nonidentity of the offenses in fact for two reasons. The first of these arises from the doctrine against splitting offenses. The second arises from the fact that there may be several offenses indistinguishable in the pleadings, except by allegations which on the trial would be held immaterial. Illustrative of the first, take an indictment for the larceny of a horse, to which the defendant pleads that he has already been convicted of stealing a bridle, which theft was at the same time and place, the two articles belonged to the same person and were taken by one act. As we have seen (*supra*, V. f. 2), by the weight of authority this plea would be good, yet it is evident that proof of the theft of a bridle would not warrant a conviction for larceny of the horse, nor vice versa, and, under the test usually applied, would not be a sufficient bar.

Of the second class the instance which is of most frequent occurrence among the authorities is perhaps the best type. Suppose that there are two sales of liquor made to A, a minor, on the same day or on different days, in violation of a statute. Each sale is itself a complete offense. Yet the only way of distinguishing the two would be by an allegation of the time of the sale. Ordinarily, however, an allegation of time is not material, and proof that defendant sold to A on May 1st would warrant a conviction under an indictment charging the sale on May 2d. By the test, therefore, the offenses would be the same, whereas in point of fact they are different, and the defendant is properly subject to prosecution for both.

It will be noted that in the two classes of cases mentioned one is the converse of the other. In the former, two indictments, apparently, for different offenses, may, under the rule against splitting offenses,

be shown to be the same offense; while in the latter, two indictments, which in all material particulars and allegations are the same, are in fact for different offenses.

It is evident, from what has been said, that ordinarily the test can furnish no conclusive criterion as to the identity in point of fact of two offenses. In some cases this has been overlooked, however, and it is held that whenever the facts alleged in one indictment would not convict under the other, the plea is insufficient. Such is the reasoning in many of the cases which have already been considered (see *supra*, V, f, 2; V, f, 3), and which need not, therefore, be here again cited, in which the doctrine against splitting offenses is denied. In many, if not in most, of these cases the result is reached as a result of the application of the test. On the other hand, in a number of cases the test is regarded as conclusive where the allegations of one indictment would convict under the other, and it is accordingly held that, since a prosecution for selling liquor to a certain person on a certain day would be sustained by proof of any sale to that person on any day within the period of the statute of limitations, and before the indictment was found, such a prosecution is a bar to any subsequent charge based on any sale within that time: See, for instance, *Reynolds v. State*, 114 Ga. 265, 40 S. E. 234, and compare, also, *Craig v. State*, 108 Ga. 776, 33 S. E. 653; *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016. This is, however, opposed to the better view and that sustained by the weight of authority: See *post*, V, g, 2, C.

B. Where Single Offense is "Split."—If the rule against carving offenses is to be of any effect at all, the test cannot be regarded as conclusive. If, to an indictment for larceny of a horse, the defendant pleads a former conviction for larceny of a bridle, the dissimilarity of the two indictments, under the test, may well be held to give rise to a presumption that the two offenses are not the same. By the weight of authority, however, this presumption is but *prima facie*, and the defendant may show by evidence aliunde that the two charges are the outcome of one act and offense. This is well expressed in *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369 (which, in spite of what is said in *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, was not overruled by subsequent Indiana cases which did no more than state the usual test). In that case it appeared that the defendant had, by one act, killed two persons, for the murder of one of whom he had been previously acquitted. "It is urged," said the court, speaking through Downey, J., "that the plea should show by proper allegation that the person in this indictment alleged to have been killed is the same person who was alleged to have been killed in the former prosecution. . . . But evidently this cannot be so, else when two persons are killed by the same act, and when the crime would therefore be one and indivisible, and when

the state had chosen to indict the defendant and try him for the killing of one of them, there could be no plea of former acquittal when he was indicted for the death of the other produced by the same act": See, also, *Sipple v. People*, 10 Ill. App. 144. This qualification, or exception it may be, to the operation of the test of identity, generally stated, is therefore necessarily recognized in all of those cases in which it is held that one offense cannot be split into parts and each part separately prosecuted. There is, however, as has been seen (*supra*, V, f, 2; V, f, 3, A), some conflict between the authorities as to this, and where the doctrine against "splitting offenses" is not recognized, the qualification of the test must have, of course, the same lack of recognition. On principle and by the weight of authority, however, the qualification seems a proper one.

C. Where Several Acts of Same Character are Involved.—In the case just considered the offenses are shown to be the same in the face of a dissimilarity in the indictments, which by the ordinary test (were it conclusive) would render the plea of no effect. On the other hand, there is a numerous class of cases in which the test of identity stamps the offenses charged in the two indictments as the same, while they are in fact distinct and several. To use an instance already employed, if there be one illegal sale of liquor on May 1st, and another on May 2d, and an indictment is preferred on each, time not being a material averment, proof of a sale on either day would support either indictment. By the test, therefore, they are the same. In fact, they are different: See *supra*, V, g, 2, A.

(1). **View that Application of Test is not Enough to Make Even a Prima Facie Case of Identity.**—According to one line of authorities, an allegation that the offenses are the same is not supported by mere proof that the indictments are in terms the same, or that the proof of the allegations in one charge would convict under the other. The defendant must do more. He must, in addition, show that the transactions charged are in fact the same. Thus, in *Chesapeake etc. Ry. Co. v. Commonwealth*, 88 Ky. 368, 11 S. W. 87, the two indictments were found at the same time, each alleging a nuisance to have been committed by obstructing the highway, the time being alleged as the same in each. To a plea on one charge of former acquittal on the other, the court says: "It is now contended that the record alone of the former case afforded evidence which, as a matter of law, conclusively sustained this plea, and that it was the duty of the court to draw this necessary legal conclusion and instruct the jury to find for the accused. This argument is based upon the general rule that if the first indictment were such that the accused might have been convicted under it upon proof of the facts by which the second is sought to be sustained, then the jeopardy which attached upon the trial of the first one is a bar to a trial upon the second one [citing authorities]. It is true the indictments were found upon the same

day; they were for the same character of offense; they covered the same period of time, because the statutory limitation under our law to such a prosecution is one year; but the time named in them as being that when the offense was committed was not material, and each obstruction was a distinct offense. The state was not confined to any particular time, but had the right to show that the appellant had so offended at any time within a year previous to the finding of the indictment. This being so, a conviction or an acquittal would not, ipso facto, bar another indictment found at the same time and charging the same character of offense. Whether the same act was proven, or attempted to be proven, upon the trial of the other one would be a question of fact; and the first trial would only be a bar to a further prosecution for such offenses as were then proven or attempted to be proven. This would, of course, have to be shown by extrinsic evidence. The general rule, therefore, above cited does not control such a case."

According to this view, a showing that the allegations of one indictment would, if proved under the other, warrant a conviction does not make even a prima facie case of former jeopardy for the same offense. The defendant must further show that they are in fact the same charge by proof that the transaction relied upon to secure the present indictment was put in evidence and relied upon to sustain a conviction on the former trial: See *Emerson v. State*, 43 Ark. 372; *State v. Blahnt*, 48 Ark. 34, 2 S. W. 190; *Evans v. State* 54 Ark. 227 15 S. W. 360; *Henderson v. Commonwealth*, 7 Ky. Law Rep. 475; *Chesapeake etc. R. Co. v. Commonwealth*, 88 Ky. 368, 11 S. W. 87; *Commonwealth v. Sutherland*, 109 Mass. 342; *People v. Gault*, 104 Mich. 575, 62 N. W. 724; *Rocco v. State*, 37 Miss. 357; *State v. Small*, 31 Mo. 197; *State v. Wister*, 62 Mo. 592; *People v. Cramer*, 5 Park. Cr. Rep. 171; *Morton v. State*, 37 Tex. Cr. Rep. 131, 38 S. W. 1019; *Fehr v. State*, 36 Tex. Cr. Rep. 93, 35 S. W. 381, 650, See, also, *State v. Lindley*, 14 Ind. 430. In *Commonwealth v. Fredericks*, 155 Mass. 455, 29 N. E. 622, it held that, whatever the rule, where all the averments are alike or similar in the two indictments, proof that the offenses are the same in fact is required where some of the averments are different, although it would seem that the averments which were there dissimilar were ones which need not be proved as charged (viz., number of articles stolen, time, etc.): See, also, *State v. Shafer*, 20 Kan. 226.

(2) **Contrary View.**—The view taken in these cases is not uniformly agreed to. According to another line of authorities, the test, while not conclusive, is prima facie evidence of identity, and if the defendant shows that either indictment would be sustained by proof of the facts alleged in the other, he thereby makes a prima facie case of former jeopardy. If, then, the two charges are in fact based upon different criminal acts or transactions, it devolves upon the prosecu-

tion to show this fact: See *State v. Nunelly*, 43 Ark. 68; *State v. Kuhnke*, 30 Kan. 462, 2 Pac. 689; *People v. Satchwell*, 61 App. Div. 312, 70 N. Y. Supp. 307; *People v. McGowan*, 17 Wend. 386; *Bainbridge v. State*, 30 Ohio St. 264; *State v. Smith*, 22 Vt. 74. Compare, also, *State v. Presbury*, 13 Mo. 342; *Page v. Commonwealth*, 27 Gratt. 954.

(3) **Identity of Offenses a Question of Fact.**—Under either of these theories, however, the test is recognized as inconclusive where there are in fact two or more transactions. The difference between the two views is merely as to the burden of proof. Accordingly, where, on the first trial, evidence was introduced of the transactions upon which it is sought to sustain the second indictment, and the prosecution was not, in the first trial, required to elect upon which specific offense and transaction it relied, the plea of former jeopardy is held to be sustained by the proof. As is said in *Chesapeake etc. Ry. Co. v. Commonwealth*, 88 Ky. 368, 11 S. W. 87, “in a case like this, it [i. e., the commonwealth] cannot, upon the trial of the second indictment, prove any act which it even attempted to prove upon the other trial. If the attempt embraced the entire year in a sort of dragnet way, then it may properly be said that the accused has been tried for all the offenses attempted to be proven. He has, in such a case, been in jeopardy as to all the unlawful acts of the year of the character of that named in the indictment; and it does not matter that the state may have then failed to show his guilt. If it could, upon the trial of one indictment, inquire as to whether at this time or that, or whether during a certain time the accused had not committed the offense, and then, because it failed to elicit his guilt, retry him upon another indictment and go over the same ground, he would be subject to continuous trials. Such a rule would be unjust to the citizens and violative of not only the letter, but the spirit, of the law.” To the same effect, see *State v. Nunelly*, 43 Ark. 68; *De-shazo v. State*, 65 Ark. 38, 44 S. W. 453; *Maher v. State*, 53 Ga. 448, 21 Am. Rep. 269; *Brinkham v. State*, 57 Ind. 76; *People v. Gault*, 104 Mich. 575, 62 N. W. 724; *Rocco v. State*, 37 Miss. 375; *State v. Stephens*, 70 Mo. App. 554. See also, *State v. Blahnt*, 48 Ark. 34, 2 S. W. 190. On the other hand, if the prosecution was at the former trial compelled to elect a specific transaction on which to rely, and did so, a subsequent prosecution for another transaction is not barred, although evidence of the latter would have been admissible and warranted a conviction on the former charge, and the same result follows where it appears that the transaction relied upon to support the second charge was not introduced on the first trial: *State v. Kuhnke*, 30 Kan. 462, 2 Pac. 689; *Henderson v. Commonwealth*, 7 Ky. Law Rep. 745; *People v. Sinell*, 131 N. Y. 571, 30 N. E. 47. As to several prosecutions for a continuous offense, see post, VI, f.

(4) **Criticism of Opposing Views.**—On principle as between the two views regarding the burden of proving the identity or nonidentity of the offenses in point of fact (see *supra*, 126 et seq.), that seems preferable which holds that the defendant makes a *prima facie* case of identity by showing that the allegations of either of the indictments if proved under the other, would warrant a conviction, and that then, if the prosecution in fact relies upon different transactions, he shall show that fact. To require that the defendant shall himself show that the transaction relied upon to sustain both charges is the same transaction is, in some cases, to require an impossibility. He cannot know upon what transaction the prosecutor intends to rely to sustain the second charge, as the distinguishing averments of time, etc., are not conclusive upon the latter. This fact is, however, within the knowledge of the prosecutor, and it seems but fair to require that when the defendant shows a *prima facie* case of identity, by proof, that the transaction upon which he has already been tried, is in terms covered by the present charge, the prosecutor should be required to indicate whether or not the two charges are for the same transaction.

h. Difference Between Prior Conviction and Prior Acquittal.

1. **In General.**—It is a statement of quite frequent occurrence in the books that the rules governing the plea of *autrefois acquit* and those governing the plea of *autrefois convict* are in no wise different. "The prohibition [in the federal constitution] is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial": *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. Rep. 1192. "The principles and rules of decision applicable to the plea of former conviction are the same with those of former acquittal. They rest on the same basis": *Thomas v. State*, 40 Tex. 36. See, for similar expressions, *People v. Van Keuren*, 5 Park. Cr. Rep. (N. Y.) 66; *Commonwealth v. Rockafellow*, 3 Pa. Super. Ct. 588; *State v. Thurston*, 2 McMull. 382. In spite of these statements, there are to be found not a few distinctions and attempts at distinctions between the two pleas of former acquittal and former conviction, suggested in some cases in the same states in which such distinctions had been said not to exist.

2. **Where Single Offense is "Split."**—In Texas, for instance, a distinction is well established on authority between a plea of prior conviction and one of prior acquittal, where there has been a carving up of one offense. The distinction seems to have first been laid down in *Simco v. State*, 9 Tex. App. 338, by White, J., in the following language: "There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and

autrefois convict, notwithstanding the immense amount of dictum and loose expression to the contrary found in the books. Autrefois acquit is only available in cases where the transaction is the same, and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both sine qua non to the sufficiency of the plea. Autrefois convict only requires that the transaction or the facts constituting it be the same." In brief, if several articles are stolen at the same time, the state may carve the larceny into as many charges as there are articles (or at least as there are owners: See, *supra*, V, f, 2, B). If it secures a conviction on one charge that is a bar to any subsequent prosecution ("because," says the court, "the transaction would constitute but one offense in law, and the plea would be good upon the strength of and by virtue of, another rule, well settled in criminal practice which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once"). If, on the other hand, the defendant secures an acquittal on one charge, he is subject to successive prosecutions on the other several charges, until he is convicted upon one ("simply because the proof necessary to a conviction in the latter cases would not convict in the former").

It is certainly somewhat difficult to see why the transaction is rendered a single offense if the defendant is convicted on the first charge, and many offenses if he is acquitted; or to appreciate why the reasons given by the court for one branch of the distinction are not equally applicable to the other. If the offense is single, an acquittal for one part is an acquittal in law for all. If the offense is not single, a conviction of one offense is not a conviction of the other. The distinction here attempted is, it is believed, unsustainable on principle is not generally recognized, and has already been criticised (see monographic note to *Roberts v. State*, 58 Am. Dec. 547, 548), although undoubtedly the law in Texas: *Simco v. State*, 9 Tex. App. 152; *Wright v. State*, 17 Tex. App. 152; *Alexander v. State*, 21 Tex. App. 406, 57 Am. Rep. 617, 17 S. W. 139; *Lewis v. State* (Tex. Cr. App.), 24 S. W. 906; *Morton v. State*, 37 Tex. Cr. App. 131, 38 S. W. 1019; *Wright v. State* (Tex. Cr. App.), 40 S. W. 419; *Davidson v. State*, 40 Tex. Cr. Rep. 285, 49 S. W. 372, 50 S. W. 365. It seems also to have been looked upon with favor in one Alabama case: *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79, 6 South. 120. (Compare, also, *Vaughan v. Commonwealth*, 2 Va. Cas. 273.)

3. As to Prosecution for Less, Barring Prosecution for Greater Offense.—So in some cases a distinction is attempted between the principles applicable with respect to a prior acquittal and to a prior conviction, as to whether a prosecution for a less offense is a bar to what is termed a "higher" offense, where defendant could not be convicted of the "less" offense, on the indictment for the higher.

“When the indictment is for the minor offense, and the defendant is acquitted, then, according to the weight of authorities, he may be tried upon the major offense. But where he is convicted of the minor offense, he cannot be tried afterward for the major offense where the evidence has been offered of the major offense, and he has been convicted upon evidence of the aggravated offense, and sentenced accordingly”: *Commonwealth v. Reed*, 4 Lane. Law Rev. (Pa.) 89. This is a case in which a pardon for rape was held to involve a pardon for burglary, with intent to commit rape. The court cites Wharton's Criminal Pleading and Practice, section 467, in support of the language quoted, but that authority does not support the statement. Compare, however, *People v. Smith*, 57 Barb. 46; *State v. Stanley*, 49 N. C. (4 Jones) 290. See, also, note to *Commonwealth v. Kinney*, 2 Va. Cas. 139.

4. **As to Prosecution for Greater, Barring Prosecution for Less Offense.**—Similarly, it is held that a conviction of being a common seller of liquors is a bar to a subsequent prosecution based upon a single sale, all the various single sales, prior to the former charge, being regarded as merged in the conviction of being a common seller, while an acquittal of the latter charge has, according to these cases, no such effect: *Morey v. Commonwealth*, 108 Mass. 433, and cases cited; *State v. Nutt*, 28 Vt. 598. Compare, also, *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, and post, VI, k, 2. We shall have occasion hereinafter to discuss the effect of an acquittal or conviction of one as common seller of liquor in barring prosecutions for specific sales, and vice versa: See, post, VI, q, 3.

5. **Under Statute Allowing but One Conviction on a Forged Instrument.**—Under a peculiar Texas statute, providing that a conviction for forgery, uttering or attempting to utter a forged instrument, is a bar to a subsequent prosecution based upon the same transaction or instrument, it is held that an acquittal has not the same effect as is provided by the statute in the case of a conviction: *Green v. State*, 36 Tex. Cr. Rep. 109, 35 S. W. 97; *Preston v. State*, 41 Tex. Cr. App. 300, 53 S. W. 127, 881, 40 Tex. Cr. Rep. 72, 48 S. W. 581; *Reddick v. State*, 31 Tex. Cr. Rep. 587, 21 S. W. 684; *Hooper v. State*, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066.

VI. Identity of Offenses—Specific Offenses.

a. **In General.**—Up to this point, we have considered only the general principles which govern in determining the identity of offenses, when a plea of former jeopardy is interposed. There is by no means entire harmony among the authorities as to these, but it is in their application to specific offenses that the greater difficulty and confusion arises. A mere review of the cases in which two offenses have or have not been held the same would obviously be of little value without some discussion of the general principles deriv-

able therefrom. Equally unprofitable would be the formulation of abstract rules without a consideration of their application, particularly where, as here, their application is a matter of no little difficulty. Even at the risk, therefore, of unduly extending this note, we shall consider the instances in which the courts have applied the principles already discussed to particular cases and specific offenses.

b. Prosecutions as Accessary and as Principal.—In misdemeanors, accessaries in fact are principals in law, the law not concerning itself to distinguish the different shades of criminality in such petty offenses: See *State v. Buzzell*, 58 N. H. 257, 42 Am. Rep. 586. In felonies, however, there is a sharp distinction between an accessary before the fact and a principal. One charged as principal in the commission of a larceny or murder cannot (in the absence of statute: See *Davis v. People*, 22 Colo. 1, 43 Pac. 122) be convicted thereunder as accessary before the fact, and the converse is equally true: *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410. An acquittal, therefore, on the one charge, is no bar to a subsequent prosecution for the other: *State v. Buzzell*, 58 N. H. 257, 42 Am. Rep. 586; *Morrow v. State*, 82 Tenn. (14 Lea) 475; *Rex v. Brienough*, 1 Mos. Cr. Cas. 477. See, also, *Ruble v. State*, 51 Ark. 170, 10 S. W. 262; *Commonwealth v. Roby*, 12 Pick. 496. One who is charged as principal in a murder may, however, be convicted on proof that he was present, aiding and abetting, and a prosecution in which a defendant is charged as present, aiding and abetting, is, therefore, barred by a previous acquittal on an indictment in which he was charged as principal: *Gaskins v. Commonwealth*, 97 Ky. 494, 30 S. W. 1017. In *Davis v. People*, 22 Colo. 1, 43 Pac. 122, a prior acquittal as accomplice or accessary before the fact to a larceny is held to bar a prosecution based upon the same facts for conspiracy to commit larceny. The court says: "The criminal conduct that would constitute him an accessary before the fact, where the object of the conspiracy has been consummated, is the same that would prove him a conspirator where the contemplated crime is not completed." To the same effect, see *Whitford v. State*, 24 Tex. App. 489, 5 Am. St. Rep. 896, 6 S. W. 537. In the Colorado case, it is held that a prior conviction, on the other hand, as a principal in the larceny, is no bar to a prosecution for conspiracy to commit larceny: See, also, post, VI, d.

c. Prosecutions for Attempt and for Completed Crime.—In *State v. McCormick*, 9 N. J. Law J. 152, it is said that "at common law, a conviction of an attempt to commit a crime will not prevent the punishment of the offender under a subsequent indictment for having committed the offense." It is more than doubtful whether this is true even at common law, it being held in *State v. Shepard*, 7 Conn. 54, that either a conviction or an acquittal of an attempt (to rape) is a bar to a subsequent prosecution for the completed offense. (Compare, however, *Queen v. Nicholls*, 2 Cox C. C.

182.) In most of the states it is now provided by statute that upon trial of an indictment for any offense the jury may find the accused not guilty of the offense charged, but guilty of an attempt to commit such offense. Under statutes such as this, an acquittal or conviction of an attempt to commit an offense is undoubtedly a bar to a subsequent prosecution for that offense, and e converso a prosecution for the offense itself is a bar to a subsequent prosecution for an attempt to commit it: *Franklin v. State*, 85 Ga. 570, 11 S. E. 876. So, in *Tadrick's Appeal*, 1 Pa. Super. Ct. 555, 38 Week. N. C. 215, that a prosecution for willfully and maliciously entering a dwelling-house, without breaking, and with intent to steal, was held barred by a previous acquittal for larceny, the court holding that the evidence relied upon to sustain the second charge would have warranted a conviction of attempt to commit larceny on the first trial. An acquittal of an attempt to commit one offense, such as rape, is not, of course, a bar to a prosecution for attempting another and distinct offense, such as burglary: *Byas v. State*, 41 Tex. Cr. App. 51, 51 S. W. 923. See post, VI, g, 4 et seq., as to whether a prosecution for an assault with intent to commit a particular felony is a bar to or is barred by a prosecution for the actual commission of the felony.

d. **Prosecutions for Conspiracy and for Completed Crime.**—The question whether a conspiracy to commit a felony is merged in the felony itself if the offense is consummated will be found considered in the note to *Whitford v. State*, 5 Am. St. Rep. 899-901. See, also, *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379. By statutes in many of the states a conspiracy to commit a felony is itself a felony, and the doctrine of merger is therefore inapplicable: *Davis v. People*, 22 Colo. 1, 43 Pac. 122. In the cases in which this question is dealt with in relation to the identity of the offenses in a plea of former jeopardy the quite uniform holding is that the conspiracy and the felony are separate and distinct offenses, and that a conviction or acquittal for the one is no bar to a prosecution for the other. The allegations essential to an indictment for conspiracy would not be sufficient to procure a conviction on an indictment for the consummated offense, nor would proof of the consummated offense be sufficient to convict of conspiracy. The two are distinct, although both may arise from the same criminal transactions: *Davis v. People*, 22 Colo. 1, 43 Pac. 122; *State v. Brown*, 95 Iowa, 381, 64 N. W. 277; *State v. Sias*, 17 N. H. 558; *Whitford v. State*, 24 Tex. App. 489, 5 Am. St. Rep. 896, 6 S. W. 537; *Bailey v. State* (Tex. Cr. App.), 59 S. W. 900; *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379. See, also, *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. Rep. 181, affirming 105 Fed. 614, and holding that "conspiring to defraud the United States" is not the same offense as "procuring false and fraudulent claims to be made against the United States,"

both being charged "as in violation of the sixtieth article of war." That the felony is charged in the indictment for the conspiracy as aggravation of the conspiracy does not change the rule or make such indictment any more effective as a bar to a subsequent prosecution for the felony as consummated: *Davis v. People*, 22 Colo. l. 43 Pac. 122; *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379. See contra, dissenting opinion of Acheson, C. J., in the case last cited. An indictment of one as accomplice or accessory before the fact, is, as we have already seen, a bar to, and is barred by, a prosecution for a conspiracy to commit the offense: See *supra*, VI, b.

e. Prosecutions for Several Acts Done in Pursuance of a Single Conspiracy.—Where several acts are done in pursuance of a conspiracy, each act being distinct from the other, the fact that they are in fact done in pursuance of a conspiracy does not make one act the "same offense" as the other. Thus in *Wallace v. State*, 41 Fla. 547, 26 South. 713, the defendant has been indicted with others and convicted of a conspiracy to extort money from A, by charging her with keeping a bawdy-house, and had been acquitted of maliciously threatening to accuse B of keeping a bawdy-house, for the purpose of extorting money. Subsequently the defendant was indicted for maliciously threatening to accuse C of keeping a bawdy-house, etc. He pleaded the former conviction and acquittal in bar, alleging that all the acts complained of were parts and in execution of one conspiracy. The court held, however, as to the plea of former conviction, that that conviction was on an indictment charging a conspiracy to extort, while the present charge was for verbally threatening with intent to extort money, and therefore for an entirely different offense (see preceding paragraph). As to the plea of former acquittal, it was held bad, since threats to B are not the same as threats to C, and an allegation that they are in execution of a single conspiracy does not make them the same offense. "While the conspiracy may be single, and therefore subject to one indictment only, yet the felonies accomplished by means of the conspiracy were separate and distinct, depending upon different acts, provable by different evidence, and accomplished by distinct though similar means. The evidence essentially necessary to sustain one indictment would not sustain either of the others, nor could defendant be convicted upon one information upon the evidence necessary to sustain either of the others." As indicated by the court, had both charges been based on the conspiracy, one alleging a conspiracy to extort from A, and the other a conspiracy to extort from C, it is probably true that the plea of former jeopardy would have been valid. That would have amounted to splitting the single conspiracy into parts, and would have been obnoxious to a principle already considered: *Supra*, V, f.

f. Continuing Offenses—Different Periods of Time.—This rule against the splitting of offenses (*supra*, VI, f) is of considerable importance also where the two indictments differ only as to the period of time in which defendant is alleged to have committed an offense which is continuous in its nature. Of such a nature are offenses like keeping a gaming or bawdy-house, being a common seller of liquor, illegal cohabitation, etc. These charge in effect a habitual course of conduct, and the question arises whether a prosecutor can carve out several periods of time from the whole period during which defendant pursued this course of conduct and treat each period so carved as a different offense.

1. Where a Period of Time is Common to Both Charges.—Where there is a period of time, however short, which is common to both indictments, there can be no question but that the offenses are the same. If, for instance, one indictment charges that defendant kept a liquor nuisance from May 1, 1893, to October 31, 1893, it is a bar to a subsequent indictment for keeping the same liquor nuisance from October 17, 1893, to April, 1894. The period from October 17 to October 31, 1893, is common to both charges and proof of the keeping between such dates would have been sufficient to convict under either indictment. It is not material that evidence of the commission of the offense between those dates was not introduced upon the first trial: *State v. Brownrigg*, 87 Me. 500, 33 Atl. 11; *Commonwealth v. Robinson*, 126 Mass. 259, 30 Am. Rep. 674; *Commonwealth v. Dunster*, 145 Mass. 101, 13 N. E. 350.

2. Where No Period of Time is Common to Both Charges.

A. View that Several Prosecutions are Permissible.—Where, however, there is not such a period of time common to both charges, the question becomes more difficult, and the authorities are not in complete harmony. According to one view, where an offense is continuous in its nature, the prosecutor may carve any period out of the time during which it was committed, and will on the trial be restricted to proof of the offense during that time. Under the doctrine of these cases, the time alleged becomes material to that extent, and the evidence will not be allowed to cover any period of time other than that charged in the indictment. From this premise it is argued that where there is no period of time common to both charges, the proof admissible under one charge could not possibly convict under the other and the offenses charged are not, therefore, the same: *Commonwealth v. Commissioners*, 116 Mass. 35, and cases cited; *Commonwealth v. Cain*, 14 Gray, 9; *Huffman v. State*, 23 Tex. App. 491, 5 S. W. 134; *Fleming v. State*, 28 Tex. App. 234, 12 S. W. 605; *United States v. Snow*, 4 Utah, 295, 9 Pac. 686 (overruled in *In re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556). See, also, *Commonwealth v. Respass*, 21 Ky. Law Rep. 140, 50 S. W. 549 (partially overruled in *Carvein v. Commonwealth*, 22 Ky. Law Rep. 1734, 61 S. W. 275).

B. Contrary View.—Both on reason and authority this view seems erroneous, and the true rule undoubtedly is that where an offense is continuous in its nature it cannot be split up into parts by carving out a number of different periods of time. Nowhere is the reason and justice of the rule against “splitting offenses” better illustrated. If the defendant has kept a disorderly house for a period of one year, he has committed one offense. Under the doctrine considered in the preceding paragraph, he may be charged and convicted separately for every month, and indeed for every week or day in the entire year. “It is,” says Mr. Justice Blatchford in *Ex parte Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556, “to prevent such an application of the penal laws that the rule has obtained that a continuing offense of the character of the one in this case [unlawful cohabitation] can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted.”

So far as concerns this question it is immaterial whether or not the evidence must be confined to the time charged in each indictment, or whether the facts alleged in one charge would, if proved, warrant a conviction under the other. As we have seen (*supra*, V, g, 2, B), the rule against “splitting offenses” is itself a qualification of, or an exception to, the operation of the usual test of identity of offenses. Proof of larceny of a horse would not convict under an indictment charging larceny of a wagon, yet if both were stolen by one act, a prosecution for one will, by the weight of authority (*supra*, V, f, 2), bar a prosecution for the other. So it is here immaterial whether the facts alleged in an indictment charging the defendant with keeping a bawdy-house from January to June would convict under a charge of the same offense from July to December. The offense, if continuous, is a single offense, and can be prosecuted, in whole or in part, but once: *Smith v. State*, 79 Ala. 257 (carrying concealed weapons); *Freeman v. State*, 119 Ind. 501, 21 N. E. 1101 (keeping house of ill-fame); *Carvein v. Commonwealth* (keeping pool-room) [overruling partially *Commonwealth v. Respass*, 21 Ky. Law Rep. 140, 50 S. W. 549, although in the latter case the offense was not in point of fact continuous]; *People v. Cox*, 107 Mich. 435, 65 N. W. 283 (keeping house of ill-fame); *In re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556 (unlawful cohabitation); *Ex parte Nielson*, 131 U. S. 176, 9 Sup. Ct. Rep. 672 (unlawful cohabitation); *Dixon v. Washington*, 4 Cranch C. C. 114, Fed. Cas. No. 3,935 (keeping faro-table); *United States v. Burch*, 1 Cranch C. C. 36 Fed. Cas. No. 14,683 (keeping disorderly house).

In *State v. Lindley*, 14 Ind. 430, the above principle is recognized, but it is held that the defendant must allege and show the offense to have been continuous.

C. Under Statutes Making Each Day's Continuance a New Offense.—A statute may, of course, make what would otherwise be a

continuing offense a new offense for each day it is continued. In such a case the question we have been considering does not arise, and a separate prosecution can be had for each day's offense: *Eureka Springs v. O'Neal*, 56 Ark. 350, 19 S. W. 969; *State v. Judge*, 43 La. Ann. 1119, 10 South. 179; *People v. Ganet*, 104 Mich. 575, 62 N. W. 724. Compare *Dixon v. Washington*, 4 Cranch C. C. 114, Fed. Cas. No. 3,935.

D. Where Offense is Continued After Previous Prosecution.

(1) **General Rule.**—The authorities recognize also, even in the absence of statute, what may be regarded as a qualification of this rule that a continuing offense may be prosecuted but once. Where, after a previous indictment and prosecution, the defendant has continued in the commission of the offense, he may be prosecuted for what has taken place since the prior indictment, although the commission of the offense both before and after was continuous. This qualification, if it be such, of the rule is obviously necessary, otherwise one prosecution would render the offender not amenable to the law, however much he might thereafter offend in the same way: *State v. Ingraham*, 96 Iowa, 278, 65 N. W. 152; *Carvein v. Commonwealth*, 22 Ky. Law Rep. 1734, 61 S. W. 275; *State v. Judge*, 43 La. Ann. 1119, 10 South. 179; *Gormley v. State*, 37 Ohio St. 120. See, also, *Dixon v. Washington*, 4 Cranch C. C. 114, Fed. Cas. No. 3935.

(2) **Desertion of Wife—Where No New Desertion After First Prosecution.**—In order that this qualification may apply, the facts occurring after the prior indictment must of themselves constitute an offense. Where the charge is abandonment or desertion of a wife, for instance, merely remaining away does not constitute an offense. There must be an act of separation. If, therefore, after a prosecution on the charge of deserting his wife, the accused simply remains away from her, there can be no second prosecution. "The law enjoins the two infractions of the marital contract, and the husband must be guilty of both these acts; that is, he must have deserted the wife, and must also have refused to maintain her. . . . As the defendant never returned to his wife after the first charge was preferred, he cannot be held to have again deserted her, nor did his refusal to live with her, to furnish her means to live on, constitute another crime. The essential act of abandonment was lacking. The abandonment was committed when he first left her, and could not be committed again until he had returned to her and resumed the conjugal relations"; *State v. Miller*, 90 Mo. App. 131. To the same effect, see *State v. Vollenweider*, 94 Mo. App. 158, 67 S. W. 942; *State v. Dunstan*, 78 N. C. 418; *Commonwealth v. Cawley*, 7 Kulp, 539; *Commonwealth v. Bowman*, 6 Kulp, 176; *Commonwealth v. Markley*, 17 Pa. Co. Ct. Rep. 254, 5 Pa. Dist. Rep. 134. In *Commonwealth v. Pickett*, 10 Kulp, 68, the facts were held to constitute a new desertion. *People*

v. Hodgson, 126 N. Y. 647, 27 N. E. 378, affirming 59 Hun, 615, 12 N. Y. Supp. 699, is distinguishable, the statute there involved making failure to provide alone an offense.

E. Where Statute Violated is Altered During Continuance of Offense.—There is still another qualification of the general rule in those cases in which, during the continuance of the offense, the statute which it violates is changed. In such case during part of the time one law is violated, while during another part, the acts are in violation of a different statute. There are then two offenses, and a prosecution for the offense during the period covered by one statute is not a bar to a subsequent prosecution for the remaining period: *State v. Webber*, 76 Iowa, 686, 39 N. W. 286. See, also, *Reg. v. Taylor*, 3 Barn. & C. 502, and *supra*, V, g. 1, B.

g. Assaults and Other Offenses.

1. Simple Assault and Aggravated Assaults.—In view of the general principles already discussed, it is a proposition too plain to require the citation of many authorities in its support that a prosecution for simple assault is a bar to, and is barred by, a prosecution based upon the same state of facts for assault and battery, or for an aggravated assault. The former is a necessary ingredient of the other, and proof of the facts necessarily alleged in either indictment would warrant a conviction under the other: See in this connection, *People v. McDaniels* (principal case), 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *Franklin v. State*, 85 Ga. 570, 11 S. E. 876; *State v. Keogh*, 13 La. Ann. 243; *Commonwealth v. Cunningham*, 13 Mass. 245; *State v. Hatcher*, 136 Mo. 641, 38 S. W. 719; *Commonwealth v. Rosenkranz*, 1 Lack. Jur. 455; *State v. Chaffin*, 32 Tenn. (2 Swan) 493; *Tribble v. State*, 2 Tex. App. 424.

2. Assault and Battery and Other Aggravated Assaults.—On the same principle a prosecution for assault and battery (or for battery alone: *People v. McDaniels* (principal case), 137 Cal. 192, ante, p. 81, 69 Pac. 1006), will be a bar to, and be barred by, a prosecution for an aggravated assault or for assault with intent to commit a felony. A simple assault is an essential ingredient and a possible verdict in all of these charges. It is immaterial, therefore, that the battery charged in assault and battery is not an absolutely essential element of an assault with intent to commit a felony (rape, for instance). Both indictments involve a charge of assault, and to try the defendant for both would be to put him twice in jeopardy on that charge. This is well brought out in *Bell v. State*, 103 Ga. 397, 68 Am. St. Rep. 102, 30 S. E. 294. See, also, *Drake v. State*, 60 Ala. 42; *Moore v. State*, 71 Ala. 307; *State v. Blevins*, 134 Ala. 213, 32 South. 637; *People v. McDaniels* (principal case), 137 Cal. 192, ante, p. 81, 69 Pac. 1006; *State v. Keogh*, 13 La. Ann. 243; *Commonwealth v. Cunningham*, 13 Mass. 245. So far as this question may be affected by the doctrine of merger (see *supra*, V, c. 3; V, d. 2).

or by the fact that the court trying the lower offense had no jurisdiction of the higher (see *supra*, V, d, 3), it has already been considered.

3. Assaults With Different Felonious Intent.—The same reasons as control in the case just considered are equally applicable where the two charges are for the same assault, but each alleges a different felonious intent. A prosecution for assault with intent to kill is therefore a bar to a subsequent prosecution for assault with intent to rob. "The substantive offense in both is the assault": *State v. Chinault*, 55 Kan. 326, 40 Pac. 662. Compare *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799 (disapproved in principal case, *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006, but it would seem distinguishable on the facts. See post, VI, g, 6). And, of course, a prosecution for assault with intent to commit manslaughter is a bar to a subsequent charge (based on the same facts) of an assault with intent to commit murder: *State v. Parmelee*, 9 Conn. 259.

4. Assault and Homicide.

A. General Rule.—At common law one charged with a homicide could not be convicted of an assault. The offenses were regarded as essentially different and the misdemeanor was deemed merged in the felony: *State v. Standifer*, 5 Port. 523; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Commonwealth v. Roby*, 12 Pick. 496; *Moore v. State*, 59 Miss. 25; *Burns v. People*, 1 Park. Cr. Rep. 182; *Regina v. Bird*, 5 Cox C. C. 20, 2 Den. C. C. 94. Accordingly, a prosecution for an assault was not a bar to, nor barred by, a prosecution for the homicide. Under some modern statutes, however, both in this country and in England, one charged with a felony which includes an assault may be convicted of an assault, and under statutes such as this it would seem that the offenses should be deemed the same, whenever the allegations of the felony charge contain an allegation of an assault (which, it seems, is not in all cases necessary: *Moore v. State*, 59 Miss. 25).

In *Regina v. Bird*, 2 Den. C. C. 94, 5 Cox C. C. 20, the question involved was whether a prosecution for assault was, under an English statute of this kind, barred by a former acquittal for murder, when it was shown that the assault had not contributed to the death on which the former charge was based. It was held by the majority of the court, all of the fourteen judges delivering separate and lengthy opinions, that inasmuch as a proper construction of the statute allowed a conviction (on the trial for homicide) of only such assaults as were shown to have conduced to the death, the defendants had never been in jeopardy of conviction of the assault which was the basis of the second prosecution, and therefore the plea of former jeopardy was had. Under such a construction of these statutes they would, in cases where death has occurred, seem to have no operation

whatever. As is said by Martin, B., dissenting: "The consequence seems . . . inevitable that in all cases of alleged murder or manslaughter, there cannot be a conviction for an assault at all under the statute, for if the assault conduces to the death, the party whose assault is so conducive must either be guilty of murder or manslaughter, or his assault must be a justifiable act."

B. Where Death Follows Prosecution for Assault.—Since, therefore, in the absence of statute, a charge of assault is regarded as different not merely in degree, but in its nature, from a charge of homicide, and a prosecution for the former will not bar a subsequent prosecution for the latter, a fortiori is this true where the death takes place after the prosecution for the assault. In such a case a new fact intervenes between the time of the former and the latter prosecution, which charges the criminal aspect of the state of facts upon which the former charge was based. "The difference is not of degree merely. The characteristic new fact here is the death": *Regina v. Friel*, 17 Cox C. C. 325. "There can never be the crime of murder or manslaughter until the party assaulted dies. These crimes have no existence in fact or law till such death. It cannot therefore, be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder or manslaughter after the death of the injured party. The death of the assaulted party creates a new crime": *Johnson v. State*, 19 Tex. App. 453, 53 Am. Rep. 385. The authorities are, therefore, uniform in holding that where the death of the victim occurs after a prosecution of the offender for assault, such prosecution is no bar to a later one for the homicide: *People v. Defoor*, 100 Cal. 150, 34 Pac. 642; *Hopkins v. United States*, 4 App. D. C. 430; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; *Commonwealth v. Rohy*, 12 Pick. 496; *Burns v. People*, 1 Park. Cr. Rep. 182; *State v. Ross*, 6 Ohio Dec. 5, 2 Ohio N. P. 368; *Johnson v. State*, 19 Tex. App. 453, 53 Am. Rep. 385; *Curtis v. State*, 22 Tex. App. 227, 58 Am. Rep. 635, 3 S. W. 86; *Regina v. Morris*, 10 Cox C. C. 480; *Regina v. Salvi*, 10 C. C. A. 480, note; *Regina v. Friel*, 17 Cox C. C. 325. See, also, the monographic note to *Roberts v. State*, 58 Am. Dec. 546.

5. Assault and Rape.—A charge of rape necessarily involves one of assault and, except, perhaps, where the old doctrine of merger is still recognized as existent, on an indictment for the former offense the accused may now be convicted of an assault: Wharton's Criminal Pleading and Practice, sec. 249. In any event, proof of the facts necessarily alleged in an indictment for rape would warrant a conviction under an indictment for an assault. Accordingly a prosecution for assault (or for any offense which itself involves a charge of assault—viz., assault and battery, is a bar to and may be barred by a prosecution for rape, where both prosecutions are based upon the same state of facts. It is immaterial whether the greater or

the less offense was first prosecuted, since in either event the defendant would have been twice placed in jeopardy of conviction for the less (assault): *People v. Purcell*, 16 N. Y. Supp. 199; *State v. Nathan*, 5 Rich. 219; *State v. Smith*, 43 Vt. 324 (compare *Sargent's Case*, 2 City H. Rec. (N. Y.) 44).

In *Commonwealth v. Bass*, 4 Kulp. 76, 3 Lanc. L. Rev. 273, the general principle as above laid down was conceded, but it was held that where there were two counts, one charging rape and the other assault with intent to ravish, where the commonwealth elected to go to trial on the count charging rape, there could have been no conviction of assault with intent to ravish, since to allow such a conviction would defeat the purpose of requiring the commonwealth to elect. Having not, therefore, been in jeopardy of being convicted on the first charge (rape) of the integral assault, such prosecution was held to be no bar to a subsequent charge of assault with intent to ravish: See, also, in this connection, *State v. Jesse*, 20 N. C. (3 Dev. & B.) 95.

6. Assault and Robbery.—Whether or not a prosecution for an assault (simple or alleged to be with felonious intent) is to be regarded as for the “same offense” as that charged in an indictment for robbery, where the assault was a part of the acts constituting the robbery, is a question upon which the authorities are not in harmony. The discord seems, however, to result, not so much from any difference as to the principles which should control, as from a conflict on the question whether or not an assault is an essential ingredient of larceny.

According to one line of authorities, a charge of assault is not necessarily involved in a charge of robbery, and proof of the facts necessarily alleged in one indictment would not, therefore, necessarily warrant a conviction under the other: *State v. Helveston*, 38 La. Ann. 314; *State v. Nathan*, 5 Rich. 219; *State v. Caddy*, 15 S. Dak. 167, 87 N. W. 927 (compare *Smith v. State*, 52 Ala. 407). See, also, *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799, which, although practically overruled in the principal case (*People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006), may perhaps be distinguished on the ground that the assaults involved in the two charges, although occurring during one transaction were not in fact the same acts or assaults.

The view which, however, seems supported by the weight of authority is that where the assault charged in one indictment is the same violence or intimidation as furnishes the basis of the robbery charge, a prosecution for one will bar a prosecution for the other. The assault is regarded as necessarily included in the robbery, so that proof of the facts alleged in the indictment for robbery would, if proved, warrant a conviction under the other charge: *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *Wileox v. Tennessee*, 74 Tenn. 5 Lea) 571, 40 Am. Rep. 53; *Moore v. State*, 33 Tex. Cr. Rep. 166, 25 S.

W. 1120; *Herera v. State*, 35 Tex. Cr. Rep. 607, 34 S.W. 943. To the same effect see *Fox v. State*, 50 Ark. 528, 8 S.W. 836, holding an acquittal on a charge of robbery a bar to a prosecution for false imprisonment. Compare, also, the principal case, *People v. McDaniels*, 137 Cal. 192, ante, p. 81, 69 Pac. 1006.

7. Assault and Maiming or Stabbing.—Where the same violence is the subject of both charges, a prosecution for assault is a bar to, and, e converso, is barred by a prosecution for stabbing or maiming: *People v. Defoor*, 100 Cal. 159, 34 Pac. 642; *Whilden v. State*, 25 Cal. 396, 71 Am. Dec. 181; *State v. Cheevers*, 7 La. Ann. 40; *Commonwealth v. Morgan*, 9 Kulp, 573. In *State v. Nichols*, 38 Ark. 550, it was held that where one was tried before a justice of the peace for an assault and battery (an offense punishable by fine), this was no bar to a subsequent prosecution for maiming, where the justice had no jurisdiction of the higher offense; although such prior charge would, it was held, be a good bar if a verdict of assault and battery merely was returned on the higher charge. The case seems wrong, but we have already considered the various propositions involved (i. e., whether the less is no bar to a greater offense of which the first court had no jurisdiction [see supra, V, d, 3]), and that it might be a bar to a verdict of guilty of the less offense on the prosecution for the greater: See supra, V, d, 4.

8. Assault and Battery, and Affray.—The authorities, although not numerous, quite uniformly hold that where the same transaction is involved in both, a charge of assault and battery will be regarded as for the "same offense" as that upon which a charge of affray is based, and a prosecution upon the one will be a bar to a prosecution upon the other. This unanimity is somewhat remarkable in view of the manifest difference between an affray and an assault. One requires a public place, the other does not; and consent on the part of the party beaten while consistent with an affray is inconsistent with that of assault. Applying the test, it would seem that proof of the facts necessarily alleged in the indictment for one offense would not warrant a conviction under the other. But the cases have, it seems, taken the view that the offenses are the same, within the requirements of a plea of former jeopardy: *Fritz v. State*, 40 Ind. 18; *State v. Stanley*, 49 N. C. (4 Jones) 290; *State v. Albertson*, 113 N. C. 633, 18 S. E. 321; *State v. Fagg*, 125 N. C. 609, 34 S. E. 197.

9. Assault and Battery, and Riot.—Where the two prosecutions are for riot and for assault and battery, the authorities are not so uniform in holding them the "same offense." According to one line of cases, they are distinct offenses, and a prosecution for one cannot bar a prosecution for the other: *Freeland v. People*, 16 Ill. 380; *Skidmore v. Bricker*, 77 Ill. 164; *Scott v. United States*, Morr. (Iowa) 142; *United States v. Peaco*, Fed. Cas. No. 16,018, 4 Cranch C. C. 601. See, also, *State v. Inness* (citing Me. Rev. Stats. 123, sec. 2). This view has not a little reason in its support, although the

cases cited do not very strongly show it, either deciding the question without discussion or by tests which have already been herein shown to be unsafe or inaccurate. The cases, as has been said, are not in entire harmony, it being held in some that the offenses are the same: *State v. Lindsay*, 61 N. C. (Phil.) 468. Where the indictment for riot in addition to a charge of that offense contains one of assault and battery, it is of course a bar to, and is barred by, another prosecution for the same assault and battery: *Holt v. State*, 38 Ga. 187; *Wininger v. State*, 13 Ind. 540; *People v. White*, 55 Barb. 606; *State v. Engles*, 3 N. C. 4, 2 Hayw. 4; *Commonwealth v. Kinney*, 2 Va. Cas. 139.

10. **Assault, and Breach of Peace, etc.**—So where the charge is the commission of a breach of the peace, or disorderly conduct, by assaulting a certain person, a prosecution thereon is held to be barred by, and to constitute a bar to, another prosecution for assault and battery, or an aggravated assault based upon the same criminal act: *Commonwealth v. Miller*, 5 Dana (Ky.), 320; *Commonwealth v. Hawkins*, 74 Ky. (11 Bush) 603; *Lynch v. Commonwealth*, 35 S. W. (Ky.) 264; *Commonwealth v. Foster*, 60 Ky. (3 Met.) 1; *State v. Locklin*, 59 Vt. 654, 10 Atl. 464. (Compare, however, *McRae v. Mayor*, 59 Ga. 168, 27 Am. Rep. 390; *City of Olathe v. Thomas*, 26 Kan. 233.) A prosecution for malicious wounding is in the same way barred by a prior conviction of breach of the peace by an assault and battery: *Commonwealth v. Bright*, 78 Ky. 238. In *State v. Ross*, 72 Tenn. (4 Lea) 442, it was very properly held that a prosecution for an attempt to commit murder by shooting was not barred by a former conviction on the charge of disturbing a religious meeting, although the same shooting occasioned both charges: See, also, post, VI, h; and for the rule where the prosecution for the breach of the peace is under a municipal ordinance, while that for the assault is under a state law, see supra, III, f.

11. **Assault, and Carrying or Exhibiting Deadly Weapon.**—A prosecution for carrying a concealed weapon is not a bar to a prosecution for an assault committed with the weapon, or for drawing and threatening to use it: *Davidson v. State*, 99 Ind. 366. The two are obviously entirely distinct offenses, each of which would be complete without any proof of the other: *State v. Robinson*, 116 N. C. 1046, 21 S. E. 701; *State v. Parker*, 81 Tenn. (13 Lea) 225; *Thomas v. State*, 40 Tex. 36; *Ford v. State* (Tex. Cr. App.), 56 S. W. 918. So it is held that a prior conviction of the statutory offense of drawing and exhibiting a deadly weapon in the presence of others in a rude, angry and threatening manner is not a bar to a prosecution for assault with a dangerous weapon with intent to inflict bodily injury: *Territory v. Stocker*, 9 Mont. 6, 22 Pac. 496. Conversely, a prosecution for assault and battery with intent to murder is no bar to a prosecution for pointing a gun at another and discharging it: *Richardson v. State*, 79 Miss. 289, 30 South. 650.

12. **Assault and Miscellaneous Offenses.**—A prosecution for assault, where based upon the same transaction, has been held to be the “same offense” as that charged in an indictment for resisting legal process: *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283; for intimidating and disturbing another: *Offutt v. Commonwealth*, 3 Ky. Law Rep. 333; and for maltreatment of a convict: *Sanders v. State*, 55 Ala. 42. On the other hand, it is held not to be the same as the offense charged in an indictment for threatening to take the life of another: *Lewis v. State*, 1 Tex. App. 323; or for kidnapping: *State v. Stewart*, 11 Or. 52, 238, 4 Pac. 128.

h. Various Offenses Against the Peace—Riot, Affray, Disorderly Conduct, etc.—We have already considered when an indictment for an assault will be considered as for the “same offense” as that charged in an indictment for a riot, an affray or a breach of the peace: *Supra*, VI, g, 8, 9, 10. As regards these various offenses inter sese, it is held that a conviction for riot is a bar to a prosecution for disturbing a religious meeting: *State v. Townsend*, 2 Harr. (Del.) 543; and it is, in the same case, said to be a bar to an indictment for the rout and also for the unlawful assembly which every riot necessarily includes. In *Hurd v. State*, 2 Root (Conn.), 186, it is said that a conviction of breach of the peace before a justice is no bar to an information for a riot. The case evidently proceeds, however, on the theory that a prosecution for a less offense, though included in the greater, cannot bar a subsequent prosecution for the greater—a proposition already considered and found to be unsupportable on principle: *Supra*, V, d. In *Reddy v. Commonwealth*, 97 Ky. 784, 31 S. W. 730, a prosecution for injury to a courthouse, in violation of statute, was held barred by a former conviction for breach of the peace by firing off pistols. This would seem to be somewhat doubtful, the only element common to both charges being, as was aptly said in *State v. Ross*, 72 Tenn. (4 Lea) 442, in another connection, “the noise of the pistols.” In *Smith v. State*, 67 Miss. 116, 7 South. 208, it was held that an acquittal of assault and battery (“and the use of profane language in the presence of a congregation assembled for public worship”) is not a bar to an indictment for disturbing religious worship by the assault and battery and by profane swearing: See, also, *Ball v. State*, 67 Miss. 358, 7 South. 353.

1. Homicide.

1. **Degrees of, and Manslaughter.**—One charged with murder may, of course, on that charge, be convicted of any degree of that offense or of manslaughter. Accordingly, a prosecution for murder is a bar to a subsequent prosecution for manslaughter: *State v. Standifer*, 5 Port. 523; *Henry v. State*, 33 Ala. 389; *State v. Shepard*, 7 Conn. 54; and e converso, a prosecution on a charge of manslaughter is a bar to a subsequent prosecution for murder: See *Moore v. State*, 71 Ala. 307; *People v. Hunckeler*, 48 Cal. 331; *State v. Shepard*, 7 Conn. 54; *State v. Foster*, 33 Iowa, 525; *Lohman v. People*, 1 N. Y. 379, 49 Am.

Dec. 340. In the case last cited the rule that an acquittal of manslaughter bars an indictment for murder is said to be an exception to the general rule that "a conviction or acquittal for a minor offense is no bar to a prosecution for the greater." The general rule is, however, as has been seen (*supra*, V, d), by the weight of reason and authority, just the opposite, and the rule that a prosecution for manslaughter bars a subsequent prosecution for the same killing, charged as murder, is in line with the general rule that a prosecution for a less is a bar to a subsequent prosecution for a greater offense in which the less is necessarily included, where a conviction of the less offense may be had on a prosecution for the greater.

In *Hilands v. Commonwealth*, 114 Pa. St. 372, 6 Atl. 267, it is held that since involuntary manslaughter, being a misdemeanor only, is not a possible verdict on a charge of murder, a prosecution and acquittal of murder is not a bar to a subsequent charge of involuntary manslaughter. To the same effect, see *Commonwealth v. Skeels*, 13 Pa. Co. Ct. Rep. 174. Compare, also, *Flynn v. State* (Tex. Cr. App.), 66 S. W. 551.

2. **And Other Offenses.**—An acquittal on the charge of murdering an unborn child is not, it is held, and properly, in *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69, for the same offense as a subsequent charge based upon the same transaction for attempting to produce a miscarriage. In *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340. On the other hand, it is said that a conviction under one statute making it a misdemeanor to administer drugs to a pregnant female with the intent to produce a miscarriage would be a bar to a subsequent prosecution under a statute making the same acts done with intent to destroy the life of the child a felony if the result intended is effected. This result is, however, expressly put by the court on a ground other than that of the prohibition against double jeopardy for the same offense. There is certainly no identity of offenses such as is required to sustain the plea of former jeopardy.

In the frequently cited case, *State v. Cooper*, 13 N. J. L. 361, 23 Am. Dec. 490, it was held that where the burning of houses resulted in the death of a person, a prosecution for arson was a bar to a subsequent prosecution for murder. So it is held that a trial of a servant for the murder of his master is a bar to a subsequent charge of petit treason and e converso: *State v. Shepard*, 7 Conn. 54; *State v. Townsend*, 2 Harr. (Del.) 543, 2 Hale's Pleas of the Crown, 246. On the other hand, a prosecution for infanticide is not barred by a prior conviction for the offense of concealing the birth of a bastard child: *State v. Morgan*, 95 N. C. 641; nor is a prosecution for carrying weapons a defense to a charge of murder for a killing committed with such weapons: *State v. Hall*, 50 Ark. 28, 6 South. 30. See as to the identity of the offenses of assault and homicide, *supra*, VI, g, 4.

j. **Rape and Other Offenses.**—In the application of the tests of identity to rape and kindred offenses, it has been held that a prose-

ection for the former offense is not a bar to a subsequent prosecution for incest: *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35, 32 S. W. 766; or of seduction: *Hall v. State*, 134 Ala. 90, 32 South. 750. In neither case would the facts alleged in one indictment be sufficient to convict under the other. In those states, however (as in Pennsylvania), where fornication is a crime, it is evidently an essential ingredient of all of the various offenses of this general class (rape, seduction, adultery, incest, etc.), and the allegations of one indictment, if proved under any other, would be sufficient to convict the defendant of fornication. Accordingly, where the law is such, a prosecution for rape would constitute a bar to a subsequent prosecution for another offense of the class named: *Commonwealth v. McIlvain*, 17 Pa. Co. Ct. Rep. 174, 5 Pa. Dist. Rep. 175 (rape and adultery); *Commonwealth v. Walker*, 3 Pa. Dist. Rep. 348 (rape, and fornication and bastardy); *Commonwealth v. Arner*, 149 Pa. St. 35, 24 Atl. 83 (rape and fornication and bastardy).

k. Adultery, Bigamy, Seduction, etc.

1. **Generally.**—So in Pennsylvania, for the same reason, a prosecution for fornication and bastardy is held to be for the “same offense” as one for seduction: *Dinkey v. Commonwealth*, 17 Pa. St. 126, 55 Am. Dec. 542; *Commonwealth v. Buck*, 3 Lane. Law Rev. 138. In both a verdict of guilty of fornication is possible, and to allow both prosecutions would be to put the defendant twice in jeopardy on that charge. In most states, however, this consideration is not present, and it has been held that a prosecution for adultery is not a bar to a subsequent charge of seduction: *Smith v. Commonwealth*, 17 Ky. Law Rep. 541, 32 S. W. 137. So a prosecution for bigamy is held not to be for the same offense as a charge of adultery: *Swan-court v. State*, 4 Tex. App. 105; or of illegal cohabitation: *Brewer v. State*, 59 Ala. 101. In the case of bigamy, the offense consists in the marrying while the other spouse is living, while the other offenses are based upon the cohabitation. Similarly, a conviction for abduction is not a bar to prosecution for contracting a marriage with the person abducted: *State v. McCormick*, 9 N. J. Law J. 152.

2. **Adultery and Lewd Cohabitation.**—In *Morey v. Commonwealth*, 108 Mass. 433, the defendant, after a conviction for lewd and lascivious cohabitation, was put on trial for adultery, the transactions on which the latter charge were based being alleged to have occurred within the same period of time as that covered by the first charge. The court held, however, that the offenses were not in law the same. Gray, J., in delivering the opinion of the court, said: “The indictment for lewd and lascivious cohabitation contained no averment and required no proof that either of the parties was married, but did require proof that they dwelt or lived together, and would not be supported by proof of a single secret act of unlawful intercourse: *Commonwealth v. Cabot*, 10 Mass. 153. The indictment for adultery alleged and required proof that the plaintiff in error

was married to another woman, and would be satisfied by proof of that fact and of a single act of unlawful intercourse. Proof of unlawful intercourse was, indeed, necessary to support such indictment. But the plaintiff in error could not have been convicted upon the first indictment by proof of such intercourse and of his marriage without proof of continuous unlawful cohabitation; nor upon the second indictment by proof of such cohabitation without proof of his marriage. Full proof of the offense charged in either indictment would not, therefore, of itself have warranted any conviction upon the other. The necessary consequence is, that, assuming that proof of the same act or acts of unlawful intercourse was introduced on the trial of both indictments, the conviction upon the first indictment was no bar to a conviction and sentence upon the second."

This result, while logically justifiable, is one of the cases in which the application of any generally adopted test of identity leads to practical injustice, and in *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672, it is held that a prosecution and conviction of the defendant for unlawful cohabitation with more than one person as his wife was a bar to subsequent prosecution for adultery based upon the acts of sexual intercourse during the period covered by the first prosecution. The court, speaking through Mr. Justice Blatchford, says: "Living together as man and wife is what we decided [in *In re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556] was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment, and was covered by and included in the first indictment and conviction. . . . The petitioner's sentence and the punishment he underwent on the first indictment was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense. Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. [See *supra*, V, h, 4.] We are satisfied that a conviction was a good bar, and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the prisoner was already convicted, and for which he had suffered punishment."

The court attempts to distinguish the *Massachusetts case* (*Morey v. Commonwealth*, 108 Mass. 433) as follows: "The crime of loose [lewd] and lascivious cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it." It would seem, however, that it is so very "strongly presumptive" as to amount to a necessary implication, and the two cases seem in conflict.

1. **Arson (Degrees of, and Other Offenses).**—We have already seen the effect of the doctrine against splitting offenses upon the crime of arson where one fire consumes several different buildings

or articles (*supra*, V, f, 6), and that a prosecution for arson will bar a subsequent prosecution for murder where a person is killed in the fire: *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490. A trial for a lesser degree of arson will, on well-settled principles, bar a subsequent prosecution for a higher degree of the same offense, although the first charge is but a misdemeanor, and the second is a felony: *Commonwealth v. Squire*, 42 Mass. 258. (Compare, however, *Walker v. State*, 61 Ala. 30.) Where there is a variance on the first trial, as where the date alleged is impossible, or where the indictment charges arson of a building other than a dwelling-house, while the proof shows that a dwelling was burned, an acquittal will not bar a subsequent prosecution on an indictment alleging the facts as they exist: *People v. Handley*, 93 Mich. 46, 52 N. W. 1032; *State v. Jenkins*, 20 S. C. 351 (see *supra*, V, e). But this class of cases is to be distinguished from that already referred to, where the same act results in burning both a dwelling-house and another building, and where the prosecution seeks to split the offense and prosecute for both: *State v. Emerson*, 53 N. H. 619, and *supra*, V, f, 6.

m. Forgery, etc.

1. **Forgery, and the Uttering of Forged Instruments.**—Forging an instrument is not the same offense as uttering such an instrument, and a prosecution upon one of these charges is not, therefore, a bar to a subsequent prosecution for the other: *Harrison v. State*, 36 Ala. 248; *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772; *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; *Hooper v. State*, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066; *Reddick v. State*, 31 Tex. Cr. Rep. 587, 21 S. W. 684; *Green v. State*, 36 Tex. Cr. Rep. 109, 35 S. W. 971; *Preston v. State*, 40 Tex. Cr. Rep. 72, 48 S. W. 581, 41 Tex. Cr. Rep. 300, 53 S. W. 127, 881 (rehearing denied), 53 S. W. 881, and see *supra*, V, h, 5, for Texas statutes. See, also, *Marshall v. State*, 6 Neb. 120, 29 Am. Rep. 363. The fact that the indictment for uttering the instrument contains an allegation that the defendant committed the forgery is immaterial, where the indictment would not be sufficient to sustain a conviction for forgery: *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772. In *People v. Allen*, 1 Park. Cr. Rep. 445, it was held that where the defendant was on a prior charge acquitted of forging a note, where the only question was the genuineness of the note, he cannot thereafter be tried for uttering the same note. If sustainable at all, the case is not one of former jeopardy for the same offense, but of former adjudication.

2. **Uttering a Forged Instrument and False Pretenses.**—In *Huff v. Commonwealth*, 19 Ky. Law Rep. 1064, 42 S. W. 907, it is held that a prosecution for uttering a forged instrument, knowing it to be forged and with intent to defraud, is a bar to a subsequent prosecution based upon the same facts for obtaining money and property by false pretenses that the instrument was valid. The holding seems proper, since the facts alleged in the second indictment would, if

proved under the first, have been sufficient to warrant a conviction: See, however, *contra*, *Commonwealth v. Quann*, 2 Va. Cas. 89. In *Baysinger v. State*, 77 Ala. 60, the same question was intended to be presented by the plea, but the court held that "a general averment that the offenses are based on, and are of, the same transaction, is not tantamount to an allegation of their identity in fact and law," and the question of their identity was not, therefore, considered. See, in this connection, *Hirshfield v. State*, 11 Tex. App. 207, as to the identity of the offenses of knowingly uttering a forged instrument and the statutory crime of "swindling."

3. Different Forgeries.—We have already seen that where a defendant has several forged instruments in his possession with intent to utter them (*supra*, V, f, 4), or at one time utters several such instruments (*supra*, V, f, 5), there is committed but one offense, which cannot be split up into as many parts as there are instruments and a prosecution had for each part. Where the offense charged is a forgery, however, the forgery of each instrument is itself a crime, and a prosecution for a forgery of one instrument is no bar to a prosecution for the forgery of another. This distinction is well brought out in *Barton v. State*, 23 Wis. 587, in which the defendant forged five drafts, each on a blank, and all of them on one sheet of a draft-book. He afterward uttered them at the same time. The court says: "The forging of each draft was a distinct and separate offense by itself: Rev. Stats., c. 166, sec. 1. The fact that the five drafts were each for the same amount, and upon the same sheet of paper, is entirely immaterial. They were five distinct and separate forgeries. The uttering of the five drafts, under the circumstances, would be one indivisible act." See, to the same effect, *Inman v. State*, 35 Tex. Cr. Rep. 36, 30 S. W. 219.

In *Calliver v. Commonwealth*, 90 Ky. 262, 13 S. W. 922, it was held, in accordance with principles already considered (*supra*, V, c. 2), that an immaterial variance between one charge of forgery (in which defendant was alleged to have forged an entire note) and another charge for the forgery of the same instrument (in which he was alleged to have merely altered certain figures) did not make the two charges for a different "offense." On proof of the facts alleged in the second indictment, defendant might have been convicted on the first, and the two charges were therefore for the "same offense."

n. Larceny.

1. Various Degrees of.—Where one has been prosecuted for petit larceny, he is not thereafter subject to a prosecution for any other grade of that offense, based upon the same theft: *Storrs v. State*, 129 Ala. 101, 29 South. 778; *Southworth v. State*, 42 Ark. 279; *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 644; *State v. Murry*, 55 Iowa. 529, 8 N. W. 359. See, also, *Commonwealth v. Squire*, 42 Mass. 258; *State v. Martin*, 76 Mo. 337. Nor is it material that in one of the indictments the offense is charged as

larceny from a dwelling: *Powell v. State*, 89 Ala. 172, 8 South. 109; or as from a shop: *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; or as from the person: *People v. Ny Sam Chung*, 94 Cal. 304, 28 Am. St. Rep. 129, 29 Pac. 642; *State v. Gleason*, 56 Iowa, 203, 9 N. W. 126. Proof of the facts alleged in an indictment for any of these offenses would necessarily convict the defendant of larceny.

2. **And Receiving Stolen Goods.**—Larceny is not, however, the same offense as knowingly receiving stolen goods. "The constituents of the two offenses of larceny and receiving stolen goods are altogether different. In the former offense the accused is guilty of the felonious taking and carrying away of the goods of another. In the latter he is guilty of receiving goods which had been taken and carried away by another. Under an indictment for the former there can be no conviction of the latter. . . . The offense of larceny is perfected before that of receiving stolen goods can be perpetrated": *Foster v. State*, 39 Ala. 229. To the same effect is *George v. State*, 59 Neb. 163, 80 N. W. 486. Compare, however, *United States v. Harmison*, 3 Saw. 556, Fed. Cas. No. 15,308.

3. **And False Pretenses.**—Nor is a prosecution for larceny a bar to, or barred by, a prosecution for obtaining money or goods under false pretenses. The two offenses are different in their nature, and the evidence sufficient to convict on one charge would render a conviction on the other impossible: *Dominick v. State*, 40 Ala. 680, 91 Am. Dec. 496; *Sims v. State*, 21 Tex. App. 649, 1 S. W. 465; *State v. Reiff*, 14 Wash. 664, 45 Pac. 318; *Regina v. Henderson*, 2 Moody, 192, 1 Car. & M. 328.

4. **And Robbery.**—Robbery is defined as "larceny by violence from the person of one put in fear": 2 Bishop's New Criminal Law, sec. 1156. It is, therefore, a simple larceny aggravated by other circumstances. Accordingly, it is held that larceny and robbery are the "same offense" within the meaning of the rule against double jeopardy for the same offense. Proof of the facts necessarily alleged in an indictment for robbery would convict of larceny: *State v. Shepard*, 7 Conn. 54; *Hickey v. State*, 23 Ind. 21; *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474; *People v. McGowan*, 17 Wend. 386; *State v. Lewis*, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741; contra, see *State v. Farrand*, 1 Root (Conn.), 446. Mr. Wharton (*Wharton's Criminal Law*, sec. 565), referring to *State v. Lewis*, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741, says: "It has been ruled in North Carolina that a conviction for larceny barred an indictment for robbery, the goods being the same. But these cases cannot be sustained except on the assumption that on the first trial the defendant could have been legally convicted of the major offense, and that his nonconviction was equivalent to an acquittal." No such assumption is at all necessary to support those cases, which are sustainable on the general rule that a prosecution for a minor offense precludes a subsequent prosecution for a greater offense in which it is included, where

on this second prosecution the defendant might be convicted of the less offense (see *supra*, V, d). The identity of the offense of robbery with a charge of assault based upon the violence employed in the robbery has already been considered: *Supra*, VI, g. 6.

5. **And Burglary.**—Burglary, unlike robbery, does not include as an essential element the crime of larceny. It is a breaking and entering of another's dwelling in the night-time with intent to commit a felony therein. The felony contemplated need not be larceny, nor need it be consummated. The offense of burglary is complete the moment the offender breaks and enters with felonious intent. Accordingly, by the weight of authority and the better reason, a prosecution for burglary is not for the same offense as a prosecution for the larceny committed after the burglary, and in the execution of the felonious intent. Proof of the facts alleged in one charge would not convict under the other: *Gordon v. State*, 71 Ala. 315; *Wilson v. State*, 24 Conn. 57; *State v. Warner*, 64 Ind. 572; *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *State v. Shaw*, 5 La. Ann. 342; *People v. Parron*, 80 Mich. 567, 45 N. W. 514; *Territory v. Willard*, 8 Mont. 328, 21 Pac. 301; *People v. McCloskey*, 5 Park. Cr. Rep. 57; *Howard v. State*, 8 Tex. App. 447; *Smith v. State*, 22 Tex. App. 350, 3 S. W. 238; *Loakman v. State*, 32 Tex. Cr. Rep. 563, 25 S. W. 22; *Fielder v. State*, 40 Tex. Cr. Rep. 184, 49 S. W. 376.

The authorities are not, however, in entire harmony as to this. Opposed to the view above considered are cases holding that an indictment for burglary is for the same offense as an indictment for the larceny committed at the time, and that a prosecution for one is a bar to a subsequent prosecution for the other. Most of these cases proceed upon the view (already considered: See *supra*, V, b, 4) taken by Waite, C. J., in his dissenting opinion in *Wilson v. State*, 24 Conn. 571, that since both may be joined in one count, they constitute but a single offense, which cannot be split and prosecuted in parts by the state: *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84; *State v. De Graffenreid*, 68 Tenn. (9 Baxt.) 287; *Benton v. Commonwealth*, 91 Va. 782, 21 S. E. 495. See, also, *People v. Smith*, 57 Barb. 46, and *Commonwealth v. Todrick*, 1 Pa. Sup. Ct. 555, 38 Week. N. C. 215. (Cited *supra*, VI, c.) So, also, the fact that evidence of the larceny might be, or actually was, introduced to show the felonious intent which accompanied the breaking and entering is deemed in many of these cases to show "in some sense" a prior jeopardy on the charge of larceny: *Copenhagen v. State*, 15 Ga. 264 (explaining *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528); *Triplett v. Commonwealth*, 84 Ky. 193, 1 S. W. 84. In the case last cited, the result reached is conceded to be adverse to the weight of authority, but it is said that "the whole reason and philosophy of the law, as well as justice to the accused, require a different ruling." In *Jones v. State*, 55 Ga. 625, the same result is reached, but by the application of the "same transaction" test, which obtains in Georgia (see

supra, p. 168, and *Gully v. State*, 116 Ga. 527, 42 S. E. 799), but not generally.

In *Rex v. Vandercomb*, 2 Leach C. C. 708, it is said that burglary is of two sorts: First, breaking and entering a dwelling-house in the night-time and stealing goods therein; secondly, breaking and entering a dwelling-house in the night-time, with intent to commit a felony, although the meditated felony be not in fact committed. These two sorts were there held to be distinct offenses, proof of one not warranting a conviction on a charge of the other.

Whether the first or the two "sorts" of burglary named is burglary at all is perhaps doubtful (see *Wood v. State*, 46 Ga. 322), but is a question which need not be here discussed. The offenses of burglary and larceny may, it is commonly held, be joined in one count, that is, there may be an allegation of a breaking, etc., with intent to steal and an allegation of the commission of the theft: *Cheek v. State*, 38 Ala. 227; *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *Gordon v. State*, 71 Ala. 315; *State v. Martin*, 76 Mo. 337; *State v. Bruffey*, 11 Mo. App. 79; *People v. Smith*, 57 Barb. 46; *Davis v. State*, 43 Tenn. (3 Cold.) 77; *Benton v. Commonwealth*, 91 Va. 782, 21 S. E. 495. (See, however, *Wilson v. State*, 24 Conn. 57; *Territory v. Willard*, 8 Mont. 328, 24 Pac. 301.) On such an indictment the defendant may, it seems by the weight of authority, be convicted of either offense, the burglary or the larceny, and a prosecution thereon is, therefore, a bar to a subsequent prosecution for either: *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *People v. Smith*, 57 Barb. 46; *State v. Lewis*, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741 (a prosecution for robbery held barred by prior one for burglary and larceny); *Turner v. State*, 22 Tex. App. 42, 2 S. W. 619. See, also, *Wilson v. State*, 24 Conn. 57, and compare *Davis v. State*, 43 Tenn. (3 Cold.) 77; *Howard v. State*, 8 Tex. App. 447; *Loakman v. State*, 32 Tex. Cr. Rep. 563, 25 S. W. 22.

6. And **Embezzlement**.—Larceny and embezzlement are not the same offense, and a prosecution for one is not a bar to a prosecution for the other. Indeed, proof of one negatives guilt of the other: *People v. Burch*, 1 N. Y. St. Rep. 751; *People v. Nichols*, 3 Park. Cr. Rep. 579. In *Commonwealth v. Tenney*, 97 Mass. 50, after an acquittal on a charge of the larceny of certain bonds, the defendant was placed on trial for a violation of a statute making it larceny for any officer or employé of a bank to convert to his own use any money, securities, etc., deposited in the bank, whether the offender was intrusted with the custody thereof or not. To this second charge the defendant pleaded autrefois acquit. The court held, however, that since it did not appear that the defendant was not intrusted with the custody of the bonds, the plea was demurrable. The argument of the court is that under the statute "the guilt and punishment of an officer of a bank or a person employed in it, who fraudulently converts to his own use the property of any person deposited

in the bank, is made the same, whether he was or was not intrusted with the custody thereof. . . . But proof that he was intrusted with the property would have defeated the first indictment. It does not appear whether the evidence at the trial of the present case showed that he was or was not intrusted with the custody of the property taken. . . . In the present case, the plea does not answer the indictment, but only one aspect of the evidence by which it may have been supported." The case seems wrong. Proof of the facts alleged in the first indictment would have convicted under the second. If both charges are sustainable by the same evidence, it is difficult to see why they should be held not to be for the same offense, simply because under another possible state of facts a conviction might be had under one charge, and not under the other.

7. **And Statutory Offenses.**—In applying the general principles to determine the identity of larceny and various statutory offenses, it has been held that the former offense is not the same as the offense of unlawful conversion of an estray: *Smith v. State*, 85 Ind. 553; and, on the other hand, it has been held to be the same offense (as regards a plea of former jeopardy) as willfully driving stock from its range: *McElmurray v. State*, 21 Tex. App. 691, 2 S. W. 892 (see, also, *Campbell v. State*, 22 Tex. App. 262, 2 S. W. 825), or of defacing the brand on cattle: *Powell v. State* (Tex. Cr. App.), 57 S. W. 94. A charge of larceny of a hog has, however, been held not to charge the same offense as does a prosecution for the statutory offense of wantonly and willfully killing a hog: *State v. Ellison*, 72 Tenn. (4 Lea) 229. An indictment and prosecution for the violation of a statute prohibiting the conversion of public funds has been very properly held a bar to a subsequent prosecution under another statute prohibiting the conversion of revenue funds merely: *Monroe v. State*, 111 Ala. 15, 20 South. 634; and an acquittal of the offense of falsely pretending to have been robbed of public revenue funds and a conversion of the same to the defendant's own use is held a bar to a prosecution for failure to pay over the same funds: *State v. Cameron*, 50 Tenn. (3 Heisk.) 78. See, also, in this connection, *State v. Howe*, 27 Or. 138, 44 Pac. 672.

o. **Burglary and the Felony Committed After the Breaking and Entering.**—The question of the identity of offenses as regards burglary arises most frequently where separate prosecutions are attempted for the breaking and entering, and for the commission of the felony intended when the breaking and entering was effected. Usually this felony is larceny, and the identity of the burglary and the larceny has already been considered: *Supra*, VI, n. 5. The principles there applied are equally applicable where the felony is an offense other than larceny. A prosecution for burglary is accordingly held by the weight of authority not to be for the same offense as a prosecution for the felony to effect which the breaking and entering was made, such as robbery: *Adams v. State* (Tex. Cr.

App., 62 S. W. 1059. (See, however, *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528. *Copenhagen v. State*, 15 Ga. 264, already cited as opposed to weight of authority; *supra*, VI, n. 5.) This is a fortiori true where the robbery was in a different part of the dwelling and after an entrance other than that which forms the basis of the burglary charge: *People v. Kern*, 8 Utah, 268, 30 Pac. 988. In *Commonwealth v. Reed*, 4 Lane. (Pa.) 89, a pardon for a rape was held to include a pardon for a burglary, consisting in a breaking and entering with intent to commit the same rape. On principle, however, the rape and the burglary are distinct offenses: See, in this connection, *Byas v. State* (Tex. Cr. App.), 41 Tex. Cr. Rep. 51, 51 S. W. 923. A prosecution for burglary is very plainly no bar to a prosecution for receiving stolen goods. They have, indeed, not a single element in common: *Pat v. State*, 116 Ga. 92, 42 S. E. 389.

p. Embezzlement and Other Offenses.—Embezzlement is not, as we have seen (*supra*, 152), the same offense as larceny, and a prosecution for the one crime is not a bar to a prosecution for the other. Nor is embezzlement the same offense as obtaining money under false pretenses, although the transaction which amounted to the conversion also gives rise to the other charge. Thus, where one intrusted with the goods of another, fraudulently pretending them to be his own, sold them to a third person, he became subject to two charges, each independent of the other, one for embezzlement, and the other for false pretenses: *State v. Faulkner*, 39 La. Ann. 811, 2 South. 539. A prosecution and acquittal for the embezzlement of certain cloth is not a bar to a subsequent prosecution for the embezzlement of the overcoats into which the cloth was made: *Commonwealth v. Clair*, 7 Allen, 525; nor is a charge of embezzling money barred by a prior acquittal on the charge of embezzling certain drafts of which the money involved in the second indictment is the proceeds: *State v. Bacon* (Mo.), 70 S. W. 473. Both of these cases are instances of a material variance between the indictment and the proof on the first trial, by reason of which a second prosecution is necessitated: See *supra*, V, E.

q. Intoxicating Liquors.

1. Several Illegal Sales of.—Where there have been several illegal sales of liquor, each such sale is a distinct offense and may be prosecuted as such. Concerning this the cases are agreed, but there is not a little conflict as to when the several prosecutions do or do not cover the same offense, and by what test this is to be determined. Ordinarily, the only way of identifying any particular sale is by alleging the date of sale and the name of the vendee. If, however, there have been several sales to one party, since the time alleged is not material, proof of any one of such sales within the period of the statute of limitations would be sufficient to convict. Which, therefore, of such sales may be made the basis of a subsequent prosecution without constituting a double jeopardy?

This question we have already considered at some length (*supra*, V, g, 2, C), and will therefore here merely refer to the cases in which the general principles there discussed have been applied to offenses arising from the sale of intoxicating liquors: See in this connection, *State v. Nunnelly*, 43 Ark. 68; *Emerson v. State*, 43 Ark. 372; *State v. Blahut*, 48 Ark. 34, 2 S. W. 190; *Evans v. State*, 54 Ark. 227, 15 S. W. 360; *Deshazo v. State*, 65 Ark. 38, 44 S. W. 453; *Craig v. State*, 108 Ga. 776, 33 S. E. 653; *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016; *Reynolds v. State*, 114 Ga. 265, 40 S. E. 234; *Brinkman v. State*, 57 Ind. 76; *State v. Sterrenberg*, 69 Iowa, 544, 29 N. W. 457; *State v. Shafer*, 20 Kan. 226; *State v. Kuhnke*, 30 Kan. 462, 2 Pac. 689; *Commonwealth v. Goulet*, 160 Mass. 276, 35 N. E. 780; *Rocco v. State*, 37 Miss. 357; *State v. Small*, 31 Mo. 197; *State v. Wilson*, 39 Mo. App. 184; *State v. Goff*, 66 Mo. App. 491; *State v. Stephens*, 70 Mo. App. 554; *State v. Broeder*, 90 Mo. App. 169; *People v. Sinell*, 131 N. Y. 571, 30 N. E. 47, affirming 58 Hun, 607, 12 N. Y. Supp. 40; *People v. Cramer*, 5 Park. Cr. Rep. 171; *State v. Cassety*, 1 Rich. (S. C.) 90; *Morton v. State*, 37 Tex. Cr. Rep. 131, 38 S. W. 1019; *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 1006; *State v. Smith*, 22 Vt. 74. See, also, *Bainbridge v. State*, 30 Ohio St. 264 (several sales of skimmed milk with intent to defraud in violation of statute); *Downing v. State*, 66 Ga. 160 (various sales of kerosene below standard to different person—each sale a distinct offense). Whether each sale is a distinct offense under a statute prohibiting the transaction of business on Sunday, see *supra*, V, f, 6.

2. **One Sale Constituting Several Offenses.**—One sale of liquor may constitute several offenses. Different circumstances incident to it may give it several different aspects, each violative of a different statute and each constituting in the eye of the law a distinct offense, punishable independently of any other. It may be a sale of liquor without a license, and at the same time a sale of liquor to a minor. To prove the first evidence of the sale and that defendant had no license to sell is all that is required. To prove the latter it must be shown that the vendee was a minor. Proof of the facts alleged in neither indictment would be sufficient to convict under the other, and a prosecution on one charge is, therefore, no bar to a prosecution on the other, although both are in fact based upon the same sale: *Ruble v. State*, 51 Ark. 170, 10 S. W. 262; *Blair v. State*, 81 Ga. 629, 7 S. E. 855; *State v. Gapen*, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25; *Commonwealth v. Vaughn*, 101 Ky. 603, 42 S. W. 117. Similarly, the same sale may give rise to the two offenses of selling liquor on Sunday and selling liquor without a license: *Smith v. State*, 105 Ga. 724, 32 S. E. 127; *Commonwealth v. Trickey*, 13 Allen, 559; *Arrington v. Commonwealth*, 87 Va. 96, 12 S. E. 224; of selling liquor on Sunday and selling liquor to one visibly intoxicated: *Altenburg v. Commonwealth*, 126 Pa. St. 602, 17 Atl. 799; or of selling liquor

without a license and of trading with a slave: *State v. Glasgow*, Ind. (S. C.) 49; *State v. Sonnerkalb*, 2 Nott & McC. (S. C.) 280. Compare dictum in *Miller v. State*, 3 Ohio St. 475, 485. Indeed, the same sale, if made under easily imaginable circumstances, might lay the offender open to almost innumerable prosecutions, each for an offense in law different from any other. A sale without a license on Sunday to a boy who was visibly intoxicated might furnish the prosecution with indictments for selling without a license, for selling liquor on Sunday, for selling liquor to a minor, and for selling liquor to one visibly intoxicated.

3. **Illegal Sale of, and Being a Common Seller of.**—It has been held that the offense of making an illegal sale of intoxicating liquors is not the same as that of being a common seller of such liquors, and that a prosecution for the latter is no bar to a subsequent prosecution for the former. The view of these cases is that in a trial for common selling the single acts of sale are not prosecuted, but are shown merely as evidence of the larger crime: *State v. Coombs*, 32 Me. 529; *State v. Maher*, 35 Me. 225. Compare, also, *State v. Flynn*, 16 R. I. 10, 11 Atl. 170 (charge of being common drunkard held not for the same offense as specific intoxications). In other states the view is taken that an acquittal of being a common seller of liquor is no bar to a subsequent prosecution for each individual sale, but that a conviction of the charge of common selling is such a bar. The reason for this view is that one may be innocent of the offense of being a common seller (not enough illegal sales having been proved to make him such), and yet guilty of making individual sales, while a conviction of being a common seller is a merger of all the single sales: *Commonwealth v. Hudson*, 80 Mass. (14 Gray) 11; *Commonwealth v. Keefe*, 7 Gray, 332; *Morey v. Commonwealth*, 108 Mass. 433; *State v. Nutt*, 28 Vt. 598.

The general question whether there exists any distinction between a prior conviction and a prior acquittal as a bar to a subsequent prosecution for the same offense has already been discussed: *Supra*, 129 et seq. If it is for the "same offense," it would seem that former acquittal should be a bar quite as much as a conviction. If it is not for the same offense, so far as any question of double jeopardy is concerned, neither an acquittal or conviction is a bar. The doctrine of former adjudication or another similar doctrine may possibly be applicable, but the view taken by the cases in Massachusetts and Vermont above cited is hardly sustainable on the grounds of prior jeopardy. Under the view of these courts it seems that after an acquittal of common selling, there might be three separate prosecutions and a conviction in each, for the same acts of selling as were relied upon to prove the offense of being a common seller. Suppose, moreover, that instead of prosecuting first for the offense of common selling, the commonwealth should first prosecute for each individual sale. Under the

view of these cases would there then be a "merger" of the offense of common selling in the convictions for the several sales?

The question is a peculiar one, and neither of the views above considered is satisfactory. As between the two, however, the doctrine of the Maine court seems preferable to that adopted in Massachusetts and (semble) in Vermont.

4. Being a Common Seller of, and Maintaining a Liquor Nuisance.—Being a common seller of liquor is a different offense from that of keeping a tippling-house, or of maintaining a liquor nuisance—i. e., a building in which liquor is kept for sale or is sold. This is a much clearer case than that just considered, since proof of all the allegations of an indictment for one of these offenses would fall far short of warranting a conviction under the other: *State v. Inness*, 53 Me. 536; *Commonwealth v. Bubser*, 14 Gray, 83; *Commonwealth v. O'Donnell*, 8 Allen, 548; *Commonwealth v. Cutler*, 9 Allen, 486; *Commonwealth v. Hogan*, 97 Mass. 122.

5. Illegal Sale of, and Maintaining a Liquor Nuisance.—The authorities are uniform in holding that a prosecution for keeping liquor for sale or for an illegal sale of intoxicating liquor is not a bar to, nor barred by, a prosecution for keeping a liquor nuisance—i. e., a tenement or building in which liquors are kept for sale or are sold: *State v. Moriarty*, 50 Conn. 415; *State v. Harris*, 64 Iowa, 387, 20 N. W. 439; *Martin v. Blattner*, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244; *State v. Graham*, 73 Iowa, 553, 35 N. W. 628; *State v. Brown*, 75 Iowa, 768, 39 N. W. 829; *State v. Wold*, 96 Me. 401, 52 Atl. 909; *Commonwealth v. McCauley*, 105 Mass. 69; *Commonwealth v. Sheehan*, 105 Mass. 192; *Commonwealth v. McShane*, 110 Mass. 502; *Commonwealth v. Hanley*, 140 Mass. 457, 5 N. E. 468; *Commonwealth v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *Commonwealth v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *Commonwealth v. McCabe*, 163 Mass. 98, 39 N. E. 777; *Commonwealth v. McCabe*, 163 Mass. 400, 40 N. E. 182; *Miller v. State*, 3 Ohio St. 475; *State v. Lincoln*, 50 Vt. 644; *State v. Jangrow*, 61 Vt. 39, 17 Atl. 733; *State v. Wheeler*, 62 Vt. 439, 20 Atl. 601. One offense, it is said, consists in the sale or keeping for sale of intoxicating liquors, while the other is the keeping or using a building for violating the law in this regard. Another way of stating this would be that one offense consists in selling or keeping liquor for sale, while the other consists in doing the same thing in a building. On principle, it is more than doubtful whether a man once convicted and punished for an illegal sale, who is again convicted and punished because he made that sale in a building, is not twice punished for the "same offense"; but the law seems thus settled upon authority. Compare, also, *United States v. Flecke*, 2 Ben. 456, Fed. Cas. No. 15,120, in which it is held that a prosecution for knowingly using a still in a dwelling-house is not barred by a prior acquittal for carrying on the business of distiller without a license.

6. Miscellaneous.—In considering the identity of various other offenses against the liquor statutes, it has been held that a charge based upon an illegal sale of liquor and one alleging that the defendant kept liquor with intent to sell it in violation of law are not for the same offense: *State v. Head*, 3 R. I. 135. Similarly, a charge of keeping a liquor nuisance is not barred by a former conviction for keeping open shop on Sunday: *Commonwealth v. Shea*, 14 Gray, 386; nor is a conviction for selling liquors within city limits, in a room not on the ground floor, a bar to a subsequent prosecution for keeping the same saloon open after the prescribed hour for closing: *Weaver v. Mt. Vernon*, 7 Ohio N. P. 374.

r. Keeping Gaming-house, etc.—A charge of gambling is not for the same offense as is a prosecution for keeping a gambling-house, the one requiring proof that the defendant gambled, while the other merely requires proof that he kept a building used for the purpose of gambling: *Tuberson v. State*, 26 Fla. 472, 7 South. 858; *State v. Mosby*, 53 Mo. App. 571; *Tutt v. State* (Tex. Cr. App.), 29 S. W. 268. For the same reason a prosecution for being a common gambler is not barred by a prosecution for keeping a gaming-room or for setting up a gambling device, lottery, etc.: *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562; *People v. Dewey*, 58 Hun, 602, 11 N. Y. Supp. 602. So, also, it is held that the offense of keeping a common gambling-house is an offense distinct and different from that of setting up a faro-table: *United States v. Holly*, 3 Cranch C. C. 656, Fed. Cas. No. 15,381. See, also, *United States v. Hood*, 2 Cranch C. C. 133, Fed. Cas. No. 15,385.

In *Fiddler v. State*, 26 Tenn. (7 Humph.) 508, it is held that a prior conviction for running a horse-race along a public road is a bar to a prosecution for betting on the race. Unless based on some peculiar provision of the statute involved, the case would seem to be erroneous. Either offense was independent of the other, and the defendant might be guilty of either and innocent of the other.

s. Miscellaneous.—In treating of the application of the general principles to specific offenses, the more important of these have been considered. There are, however, a number of cases which do not fall definitely into any general classification, and which, while worthy of reference, it is neither possible, nor perhaps desirable, to discuss at any length. The following offenses have been held not to be the 'same offense' within the prohibition against double jeopardy for the same offense, and a prosecution for one is therefore held no bar to a prosecution for the other. Illegal disinterment and malicious destruction of personal property (coffin): *State v. Magone*, 33 Or. 570, 56 Pac. 648; keeping store open on Sunday and keeping disorderly house: *Price v. State*, 96 Ala. 1, 11 South. 128; receiving goods stolen by a slave, and unlawful trading with slave: *State v. Taylor*,

2 Bail. (S. C.) 49; giving aid and comfort to the enemy, and giving intelligence to the enemy: *United States v. Cashiel*, 1 Hughes, 569; Fed. Cas. No. 14,744; conspiracy to defraud United States, and conduct unbecoming an officer: *Carter v. McCloughrey*, 183 U. S. 365, 22 Sup. Ct. Rep. 181; placing obstruction with intent to obstruct railway train; and obstructing a railway train: *Commonwealth v. Bakeman*, 105 Mass. 53; using obscene and vulgar language in presence of females, and using opprobrious words and abusive language to and of another: *McIntosh v. State*, 116 Ga. 543, 42 S. E. 793; public nuisance in using a highway, and public nuisance in failing to construct another highway in place of one taken by railroad: *Commonwealth v. Alleghany Valley Ry. Co.*, 14 Pa. Super. Ct. 336; fraudulent registration and illegal voting: *In re Donohue*, 6 Ohio Dec. 389, 4 Ohio N. P. 296; willfully and wantonly killing a swine, the property of another, and willfully killing a swine with intent to injure the owner: *Irvin v. State*, 7 Tex. App. 78; keeping house of ill-fame, resorted to for purposes of prostitution, and being a disorderly person, keeper of a bawdy-house: *People v. Cox*, 107 Mich. 435, 65 N. W. 283.

A question frequently confused with that of the identity of offenses as involved in a plea of former jeopardy is that of prior adjudication. In such a case the objection is not that the defendant will be twice put in jeopardy for the same offense, but that the result of a previous trial is an adjudication of a certain fact in favor of defendant which shows his innocence of the present charge. An example of this is where the defendant is acquitted of a certain charge and is then placed on trial for perjury in having sworn on the first trial that he was innocent of that offense. This is not a question of the identity of offenses, and will not, therefore, be here discussed. See, however, in this connection, *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385; *Waddington v. Commonwealth*, 22 Ky. Law Rep. 1108, 59 S. W. 851; *Cooper v. Commonwealth*, 106 Ky. 909, 21 Ky. Law Rep. 546, 51 S. W. 789, 59 S. W. 524; *United States v. Butler* (D. C.), 33 Fed. 493. See, also, as to prosecution for breaking jail where defendant has been acquitted of the charge on which he was held when he committed the offense of jail-breaking, *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385.

HENLEY v. WILSON.

[137 Cal. 273, 70 Pac. 21.]

A HUSBAND is Answerable for an Assault Committed by His Wife, though he was not present, and her act was without his knowledge or consent. The common law rule making a husband liable for the torts of his wife has not been changed by the statutory law of California. (p. 163.)

Anson Hilton, for the appellants.

Reed B. Terry and L. D. Windrem, for the respondent.

273 **TEMPLE, J.** It was admitted on the trial that the husband was not present at the time of the assault, and had no knowledge of the occurrence until some time afterward. An instruction was asked by appellant to the effect "that the husband is not responsible for the wrongful acts of the wife committed out of his presence and without his knowledge or consent." This was refused, and a verdict for plaintiff was returned and judgment went against both defendants, from **274** which the husband appeals. Whether this proposed instruction should have been given is the only question involved.

While there is a conflict in the authorities, appellant concedes at the outset that a majority of the cases still hold to the common-law rule, which makes the husband liable absolutely for all torts committed by the wife. This statement is too broad. Pomeroy on Remedies and Remedial Rights (sections 320 and 321) states that as to all torts committed by the wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, the common-law rules remain unchanged. Since she is permitted to manage her separate estate as though she was a feme sole, it follows that in such management she must be responsible as a feme sole.

The common-law rule must prevail, unless it has been changed by statute. No express change has been made, but it is contended that, since the wife now retains as her own such property as she has at the time of the marriage, and such as she afterward may acquire by gift, descent, or devise, and may manage her own separate estate, she should now be held solely responsible for her torts, on the principle that the reason for the common-law rule has ceased to exist and therefore the rule should cease.

But what all the reasons for the rule were originally is not now so easy to determine, and accordingly it was said by Mr. Justice Field, in *Van Maren v. Johnson*, 15 Cal. 312: "It matters not what was the origin of the common-law doctrine, its rule is settled and exists independently of the grounds on which it originally rested." These rules are quite ancient, and cannot be said to have been rested solely upon the fact that the husband may take all the wife's personal property and her earnings and may control her person, or that she can have no estate from which a judgment against her could be satisfied, added to the supposed merger of her legal personality in his. It was said by the supreme court of Texas, in *Zeliff v. Jennings*, 61 Tex. 458, that the doctrine "rests perhaps mainly upon the supposition that her acts are the result of the superior will and influence of the husband. Owing to the intimate relation of husband and wife, and to the nature of the control given him by law and social usage over her conduct and actions, it would be difficult, if not impossible, ²⁷⁵ for the courts to determine when she had acted at her own instance, and when she was guided by his dictation." And it may be added in a case where the wife has no separate estate, if the husband cannot be held, the aggrieved person will have no redress and upon the wife there will be no restraint of pecuniary responsibility. If so disposed, she could with impunity blast the lives of her neighbors by most grievous slanders. Nor is it true, in the absolute sense, that she has no interest in the estate of her husband. She is entitled to a support out of it, and to be maintained in a degree of comfort proportionate to his wealth. To make this fortune liable for her torts may directly affect her. It may diminish her comfort and style of living.

As to the community property, if the coverture is ended in any mode during her life without her fault, one-half of it will be hers. Most wives consider themselves equally interested in accumulations, and properly so. At common law even, they had morally an interest in the fortune made or inherited by the husband. In some circumstances they could secure a separate maintenance from it on a scale proportionate to its amount. We hear much of the power over the wife given to the husband by the common law, which is now thought to have been oppressive. But it had its other side. It was calculated to make a more complete and indissoluble union in which the wife had rights that could be lost only by her violation of her marriage vow, and, I think, to make the common

earnings liable for the torts of each tended in the same direction. Each became the other's "keeper." These earnings are held by the husband, but are liable for the support of the wife.

Since the reasons of the common-law rule cannot now be fully known, we are at liberty to suppose that it was founded upon these and many other considerations, as well as upon those usually stated.

But many of the reasons upon which it is commonly supposed the common-law rule depended still subsist, and the express limitations upon the liability of the husband or of the community property for the debts of the wife imply that in other respects the common law still prevails. For instance, the husband is the head of the family, and may choose the family residence: Civ. Code, sec. 156. He is entitled to the **276** custody and control, and to the earnings, of minor children as against the wife (Civ. Code, sec. 197), unless during separation: Civ. Code, sec. 198. The provisions of the code giving the wife the power to make contracts, with reference to property, negative the idea that she has in other respects the power or the responsibility of a *feme sole*. So section 170 of the Civil Code, as first adopted, expressly provided that the community property shall not be liable for the debts of the wife contracted before marriage, leaving it still liable for her debts contracted after marriage: See *In re Burdick*, 112 Cal. 398, 44 Pac. 734, opinion of Mr. Justice Harrison; also, *Van Maren v. Johnson*, 15 Cal. 308; *Vlautin v. Bumpus*, 35 Cal. 214.

Van Maren v. Johnson, 15 Cal. 308, was a suit against husband and wife for services rendered the wife before marriage. Judgment was against both, but in terms it provided that it could be satisfied from her separate property or from the community property. The husband appealed, and the only question was as to the liability of the community property. Upon this question Judge Field said: "The statute in terms provides that the separate property of the wife shall be liable for her debts contracted previous to the marriage, and at the same time that the separate property of the husband shall not be thus liable. It is silent as to the liability of the common property as to such debts and also as to the liability of that property for the previous debts of the husband."

The learned judge then proceeds to show that the common law is the basis of our jurisprudence, and that the statute has modified that law on this matter only in two respects: "It renders the separate property of the wife liable and exempts

the separate property of the husband. Beyond this exemption of his separate property his liability exists—that is to say, he is liable to the extent of the common property.” That is, the common law prevails, except as it has been modified by statute.

Furthermore, by the express provision of the statute, the wife cannot be sued without her husband for a tort which does not concern her separate estate. She can sue or be sued alone only when—1. The action concerns her separate property or her claim to the homestead; 2. When the action is between herself and husband; 3. When she is living in separation²⁷⁷ by his desertion, or under an agreement in writing: Code Civ. Proc., sec. 370.

And it has been held that in an action for damages which accrue for the injury of the wife the husband must be joined, and the recovery will be community property: *McFadden v. Santa Ana etc. R. R. Co.*, 87 Cal. 464, 25 Pac. 681; *Neale v. Depot R. R. Co.*, 94 Cal. 425, 29 Pac. 954. See, also, *Sheldon v. Steamship Uncle Sam*, 18 Cal. 527, 79 Am. Dec. 193.

I think there would be no profit in discussing the cases cited by appellant from other states. In some the statutes expressly provide against the liability of the husband for the torts of the wife. In others, all the earnings of the wife during coverture, and all recoveries for personal injuries, are her separate property. In some cases cited the tort accrued in the management of her separate estate. But whatever the rule may be in other jurisdictions, the principles which are determinative of the case have been settled here, and are in accordance with the rule prevailing in a majority of the states.

Some of the cases cited by the respondent are interesting, because they discuss the reason upon which the common-law rule was believed to be based: See *Kowing v. Manly*, 49 N. Y. 201, 10 Am. Rep. 346; *Alexander v. Morgan*, 31 Ohio St. 548; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366.

The judgment is affirmed.

Henshaw, J., concurred.

McFARLAND, J., concurring. I concur in the judgment of affirmance. I also concur in the opinion of Mr. Justice Temple, with the exception of a few expressions therein which are not necessary to a determination of the case. I see no escape from the proposition that a husband's common-law lia-

bility for the torts of his wife has not been changed by the statutory law of California. If there be any injustice in the doctrine, the remedy is with the legislature.

LIABILITY OF A HUSBAND FOR THE TORTS OF HIS WIFE.*

I. Under the Common Law.

- a. The General Rule.
- b. Wrongs Connected with Contracts.
- c. Reasons for the Rule.
 1. In General.
 2. Coercion by Husband.
- d. Soundness of the Doctrine.

II. Under the Married Women Statutes.

I. Under the Common Law.

a. The General Rule.—Of all the remarkable rules of the common law none are more striking than those governing the relation of husband and wife. However absurd they may appear when viewed singly, when associated with one another and considered as a whole, they gain a plausibility that has some claim to be styled the perfection of human reasoning, and a strength and vitality that have survived, save for modern statutory modification, to the present day. We are here concerned with that branch of the law of husband and wife which has to do with the liability for the torts of married women. And there seems to be no dissent among the authorities from the general proposition that a husband is liable for the torts of his wife, whether they were committed before marriage or during coverture: See *Bobe v. Frowner*, 18 Ala. 89; *Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356; *Stockwell v. Thomas*, 76 Ind. 506; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Phillips v. Phillips*, 46 Ky. (B. Mon.) 268; *Little v. Gardner*, 5 N. H. 415, 22 Am. Dec. 468; *Peak v. Lemon*, 1 Lans. 295; *Flannagan v. Tinen*, 53 Barb. 587; *Kowing v. Manley*, 49 N. Y. 192, 10 Am. Rep. 346; *Sisco v. Cheeney*, *Wright* (Ohio), 9; *Hawk v. Harman*, 5 Binn. (Pa.) 43; *Ferguson v. Neilson*, 17 R. I. 81, 33 Am. St. Rep. 855, 20 Atl. 229; *Knox v. Pickett*, 4 Desaus. (S. C.) 199; *Hubble v. Fogartie*, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628; notes to *Commonwealth v. Neal*, 6 Am. Dec. 106-108; *Brazil v. Moran*, 83 Am. Dec. 776-778.

A married woman's torts may be committed, as is succinctly stated by Mr. Justice Smith, in *Kosminsky v. Goldberg*, 44 Ark. 401, "under either of the following circumstances: 1. Where the husband is absent and had no knowledge of the intended act, as in *Head v. Bris-*

*REFERENCES TO MONOGRAPHIC NOTES.

Liability for torts of married women: 6 Am. Dec. 107-109, 83 Am. Dec. 776-778.
 Liability for crimes of married women: 33 Am. St. Rep. 89-96.

coe, 5 Car. & P. 484, 24 Eng. Com. L. Reg. 667, where a man was held answerable for a libel published by his wife, although they were permanently living apart; 2. Where the husband is absent, but where the tort is done under his direction and instigation, as in *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270; 3. Where the husband was present, but the wife acted of her own volition, of which *Cassin v. Delaney*, 38 N. Y. 178, is an example; and 4; Where the tort is committed in the company of the husband, and by his command or encouragement, for instances of which see *Dailey v. Houston*, 58 Mo. 361; *Brazil v. Moran*, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772. In the first three cases they are jointly liable, and the wife must be joined. She is really the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the case last supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Commentaries, 149, where it is said: 'If committed in his company, or by his order, he alone is liable.''' The statement must be limited to the case of her acting by his coercion: *Handy v. Foley*, 121 Mass. 159, 23 Am. Rep. 270. To the same effect as to the principles laid down in the *Arkansas* decision, see *Bruce v. Bambeck*, 79 Mo. App. 231; *Cassin v. Delaney*, 1 Daly, 224; *Wheeler etc. Mfg. Co. v. Heil*, 115 Pa. St. 487, 2 Am. St. Rep. 575, 3 Atl. 616.

b. Wrongs Connected with Contracts.—This general rule does not extend to all wrongs committed by a married woman. The torts or frauds of a wife for which a husband is liable at the common law are such as are torts simpliciter, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife: *D. Wolff & Co. v. Lozier* (N. J.), 52 Atl. 303; *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626. Thus an action will not lie against a husband and wife for her false and fraudulent representations that she was a widow at the time she executed to the plaintiff a bond and mortgage, in exchange for which he gave to her promissory notes to a large amount against a third person: *Keen v. Hartman*, 48 Pa. St. 497, 86 Am. Dec. 606, 88 Am. Dec. 472. Nor is she liable for a wrong based upon a contract relation: *Ferguson v. Neilson*, 17 R. I. 81, 33 Am. St. Rep. 855, 20 Atl. 229; though it is otherwise under statutes investing her with power to contract and to sue and be sued: *Russell v. Phelps*, 73 Vt. 390, 50 Atl. 1101.

c. Reasons for the Rule.

1. In General.—The reasons for holding the husband liable for

the torts of his wife under the common law appear when the general law of husband and wife is considered. He had almost absolute control over her person, so far as it was amenable to control; he was entitled to her services, and consequently to her earnings; he had a right to her goods and chattels; he could reduce her choses in action to possession during her life; he could collect and enjoy the rents and profits of her real estate. Thus he had dominion over her property and person. She was in a condition of complete dependence. She could not contract in her own name; she was bound to obey him at the peril of corporal chastisement; and her legal existence was merged in his, so that they were termed and regarded as one person at law: *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489. If it be conceded that the above recognized principles of the common law are just—a feat impossible to the rational mind—then there is justice in making a husband liable for wrongs perpetrated by his wife, even to those before marriage, for if he takes her assets he should be charged with her liabilities. In truth, “the whole theory of the common law is a slavish one, compared even with the civil law. The merging of the wife’s name in that of her husband is emblematic of the fate of all her legal rights. The torch of Hymen serves but to light the pile in which those rights are offered up”: *Marshall v. Oakes*, 51 Me. 308.

2. **Coercion by Husband.**—Deferring further comment on the reasonableness of imposing such liability on a husband to a subsequent portion of this note, we shall here give especial attention to the question of coercion, since the husband’s responsibility has been thought to rest largely upon the supposition that his wife’s acts are the result of his superior will and influence: *McQueen v. Fulgham*, 27 Tex. 463. According to the common law, if a wife committed a tort in the presence of her husband, a presumption arose that she acted under his direction or coercion, and hence he alone was answerable. Probably this presumption in most cases rested on a most slender basis of fact, yet it generally prevailed: *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772; *Smith v. Schoene*, 67 Mo. App. 604; *Park v. Hopkins*, 2 Bail. (S. C.) 411. But this presumption was only *prima facie*. It might be rebutted and the wife held jointly liable with her husband: *Warner v. Moran*, 60 Me. 227; *Ferguson v. Brooks*, 67 Me. 251; *Miller v. Sweitzer*, 22 Mich. 391; *Wagener v. Bill*, 19 Barb. 321. Indeed, she might be responsible for a tort, an assault, for example, committed of her own free will, although he was present and joined therein: *Shane v. Lyons*, 172 Mass. 199, 70 Am. St. Rep. 261, 51 N. E. 976. His presence and command must concur to justify her exemption from liability. An offense by his direction, but not in his presence, or in his presence but not by his direction, is not within the rule that gives her immunity: *State v. Camp*, 41 N. J. L. 306; *O’Brien*

v. Walsh, 63 N. J. L. 350, 43 Atl. 664; Cassin v. Delaney, 38 N. Y. 178. If in his presence she acts freely and of her own will, it is their joint tort: Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851. See, also, Clement v. Wafer, 12 La. Ann. 599; Crawford v. Doggett, 82 Tex. 139, 27 Am. St. Rep. 859, 17 S. W. 929.

There is no legal presumption, however, that acts done by a wife in her husband's absence are done under his coercion or control: Heckle v. Lurvey, 101 Mass. 344, 3 Am. St. Rep. 366; Bruce v. Bombeck, 79 Mo. App. 231. She is liable for a wrong not committed in his presence nor under his supposed influence: Merrill v. St. Louis, 83 Mo. 244, 53 Am. Rep. 576. But his absence does not relieve him from responsibility, as where she commits a slander out of his presence: Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086. He is answerable for her slanderous words spoken in his absence and without his consent: Presnell v. Moore, 120 N. C. 390, 27 S. E. 27. And the same is true in case she commits an assault: See the principal case, ante, p. 160. In Louisiana, a husband not shown to have been cognizant of slanderous words of his wife is not answerable for them: McClure v. McMartin, 104 La. 496, 29 South. 227.

While it is true, if the wife acts in the absence of her husband, there is no presumption that she acts under his coercion, still, if he is near enough for her to act under his immediate influence and control, though not in the same room, he is not absent within the meaning of the law. If he is on the premises, a momentary turning of his back, or a momentary absence from the room, may still leave her under his influence. Probably if he is in the yard or barn, while the act is done in the house, he will be considered present in contemplation of law: See Commonwealth v. Munsey, 112 Mass. 287; Commonwealth v. Flaherty, 140 Mass. 454, 5 N. E. 258.

d. Soundness of the Doctrine.—It may be presumptuous, in the face of the foregoing authorities, to question the soundness of the common-law liability of a husband for the torts of his wife, but our convictions on the question impel us to do so. We shall, therefore, proceed to an examination of the reasons, so far as any appear to have been advanced, for the doctrine. And first we shall consider the theory of the influence, control, and coercion of the husband as a ground for his responsibility. This may have been a more or less substantial reason for holding the husband answerable in those early days when married women were practically under the absolute dominion of their husbands, and were property rather than wives. But a rule suited to those barbaric times need not necessarily appeal to us of the present day with any great degree of favor or respect. One's observation of society at its present stage of development need not be wide to convince him that husbands are more prone to commit torts at the instigation of their wives than are wives to be coerced into wrongdoing by their husbands. The sup-

position that in committing a tort a wife acts under the superior will and influence of her husband must in many, if not most, cases have no foundation of fact or probable fact.' Husbands are more likely to admonish their wives to good behavior than to incite them to ill deeds. There would be much reason in indulging the notion that a child acts under the coercion or influence of his parent in perpetrating a wrong, but the law imposes no liability on a parent for the torts of his child. Of course, if a husband actually coerces his wife, then he becomes a tort-feasor, just as he would in case he instigated his neighbor to commit a wrong. But to infer coercion from the mere fact of marital relation is, in our opinion, unreasonable, especially when the present status of married women is considered. Why not make the compulsion a matter of proof and not of supposition and presumption? The difficulty of proving it would probably be the answer. In Connecticut, the rule that a wife is presumed to act under her husband's compulsion when he is present no longer prevails, and if she would justify her conduct on the ground of his coercion, she must prove that he in fact compelled her: *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855.

But it is said in the principal case that where "the wife has no separate estate, if the husband cannot be held, the aggrieved person will have no redress, and upon the wife there will be no restraint or pecuniary responsibility." If she was irresponsible before marriage by reason of having no property, no reason is perceived why there should be any responsibility after marriage. If the law sees fit not to hold her civilly accountable for her torts when a feme sole, why should it not permit that irresponsibility to continue, and not visit the penalty of her wrongful acts upon her husband? Perhaps the answer is that she has, in a certain sense, an interest in the property of her husband. So has a child in his parent's estate.

And then it will be argued that he should be responsible by reason of the marital relation. And this brings us to the fundamental theory underlying the law of coverture—the legal fiction of the oneness of husband and wife, the husband being the one. We know of no field of serious investigation, except in legal realms, where law is founded upon or deduced from fiction, unless mistakenly. Imagine Newton, Darwin, or Emerson, basing principles and laws upon what is known to be false. Law can have no other foundation but truth, and anything otherwise grounded does not deserve the name of law, and is not law, notwithstanding what courts may have said to the contrary from time out of mind. In recent times we are getting away from this fiction. It is realized that the highest interests of the family life are subserved by recognizing the individuality of the spouses, and not attempting to merge the wife's identity in the husband.

II. Under the Married Women Statutes.

In legislation, the result has been statutes giving to married women the capacity to sue and be sued, to contract, and to hold and manage property, in a large measure as though unmarried. When the effect of these statutes on the liability of a husband for his wife's torts came before the supreme court of Illinois for decision, in the case of *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578, that tribunal declared the true doctrine that such liability has no existence. In the course of an able opinion, Mr. Justice Thornton said: "The intention of the legislature to abrogate the common-law rule, to a great degree, that husband and wife were one person, and to give the latter the right to control her own time, to manage her separate property, and contract with reference to it, is plainly indicated by these statutes. While they do not expressly repeal the common-law rule that the husband is liable for the torts of the wife, they have made such modification of his rights and her disabilities as wholly to remove the reason for the liability. . . . A liability which has for its consideration rights conferred should no longer exist when the consideration has failed. If the relations of husband and wife have so changed as to deprive him of all right to her property, and to the control of her person and her time, every principle of right would be violated to hold him still responsible for her conduct. If she is emancipated, he should no longer be enslaved. . . . So long as the husband was entitled to the property of the wife and to her industry, so long as he had power to direct and control her, and thus prevent her from commission of torts, there was some reason for his liability. The reason has ceased. The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. The foundations hitherto deemed so essential for the preservation of the nuptial contract, and the maintenance of the marriage relation, are crumbling. The unity of husband and wife has been severed. They are now distinct persons, and may have separate legal estates, contracts, debts, and injuries. . . . His legal supremacy is gone, and the scepter has departed from him. . . . Her brain and hands and tongue are her own," and we may add that she alone should be responsible for them.

The decision of the Illinois court has been followed in several other jurisdictions: See *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489, 4 Pac. 862; *Lane v. Bryant*, 100 Ky. 138, 37 S. W. 584; *Culmer v. Wilson*, 13 Utah, 129, 57 Am. St. Rep. 713, 44 Pac. 833. Other courts, however, have followed the old rule, and held the husband liable for his wife's torts, notwithstanding the married women's statutes: See *Henley v. Wilson*, 137 Cal. 273, ante, p. 160, 70 Pac. 21; *Choen v. Porter*, 66 Ind. 194; *Ferguson v. Brooks*, 67 Me. 251; *Morgan v. Kennedy*, 62 Minn. 348, 54 Am. St. Rep. 647, 64 N. W. 912; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947; *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 364; *Mangam v. Peek*, 111 N. Y. 401, 18 N. E. 617;

Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Quick v. Miller, 103 Pa. St. 67; Zeliff v. Jennings, 61 Tex. 458. This diversity of judicial opinion may, perhaps, be accounted for to some extent by the varying terms of different statutes. Thus the Minnesota statute, while investing married women with many legal rights, seems expressly to save the common-law liability of husbands. But, on the other hand, the married women statutes of California are probably as liberal as those of any state, and yet the supreme court of that state, in the principal case, went to the full length of the ancient doctrine, and held a husband liable for an assault made by his wife in his absence and without his knowledge or consent. Some further reason must be sought than the diversity of the statutes of different states. We certainly should have expected a different conclusion from the California court, not only because of the extent to which the rights of married women have been enlarged under the laws of that state, but because the rule laid down in many of the older cases has expressly been corrected by statute.

Some of the legislatures have enacted in unmistakable terms that married women are answerable for their torts, and that their husbands are not: See Strouse v. Leiff, 101 Ala. 433, 46 Am. St. Rep. 122, 14 South. 667; Britt v. Pitts, 111 Ala. 401, 20 South. 484; McCabe v. Berge, 89 Ind. 225; Burt v. McBain, 29 Mich. 260; Ricci v. Mueller, 41 Mich. 214, 2 N. W. 23; Strubing v. Mahar, 61 N. Y. Supp. 799, 46 App. Div. 409; Kuklence v. Vocht (Pa.), 13 Atl. 198. Some of these enactments seem to have been the direct result of the tenacious adherence by the courts to the intolerable doctrine of the past.

Under the Maine statutes, a husband is not liable if his wife commits a wrong without his presence or knowledge: *Hinds v. Jones*, 48 Me. 384. And the Connecticut statute abolishes the presumption of coercion from a husband's presence. If a wife would escape liability for a tort done by her in the presence of her husband, she must prove that he coerced her: *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855. A wife alone is liable for her torts committed in the management and control of her separate property, since the modern statutes relating to married women: *D. Wolff & Co. v. Lozier* (N. J. L.), 52 Atl. 303.

OSGOOD v. LOS ANGELES TRACTION COMPANY.

[137 Cal. 280, 70 Pac. 169.]

STREET RAILWAYS—Care to be Exercised by.—A carrier of passengers is required to exercise the highest degree of care in their transportation, and this rule is applicable to street railways. (p. 172.)

NEGLIGENCE.—Presumption of When Passenger is Injured by Collision Between two Railroads.—Where, through a collision between two street railway cars operated by different companies, a passenger is injured, it will be presumed, in an action brought by him to recover for such injury, that it was due to the negligence of the corporation whose passenger he was. (p. 172.)

NEGLIGENCE.—Presumption of Applies when the case is submitted to the jury, and it is not true that the presumption of negligence existing when a passenger is injured by an accident on the railway on which he is riding applies only when the question arises on the sufficiency of the evidence to sustain the verdict or on motion for a nonsuit. The rule is equally applicable when the case is submitted to the jury. (p. 174.)

E. E. Milliken, for the appellant.

Nathan Newby, for the respondent.

280 CHIPMAN, C. This action was brought to recover damages for personal injuries to plaintiff, resulting from a collision between defendant's (the Los Angeles Traction Company's) **281** street-cars, on which plaintiff was a passenger, and a car of the defendant (the Los Angeles Railway Company), a separate and different corporation. Both companies were joined as defendants, but at the trial plaintiff dismissed the action as to the latter company. Plaintiff had the verdict of the jury, and defendant appeals from the judgment and order denying motion for a new trial.

The following instruction was given at the request of plaintiff, and is claimed by appellant to be error:

"1. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. And if you find that while the plaintiff was being carried as a passenger by the defendant, the Los Angeles Traction Company, the car upon which she was a passenger collided with a car operated by the Los Angeles Railway Company, and that she was thrown from said car and injured, then a presumption of negligence arises which throws upon

the defendant, the Los Angeles Traction Company, the burden of showing that the injury was sustained without any negligence on its part, and in the absence of such evidence your verdict should be in favor of the plaintiff for such sum as will compensate her for the damages sustained."

Appellant's objection is, that the jury were told, in effect, that the recited facts, if true, raised a presumption of negligence on the part of appellant; that it shifted the burden of proof to appellant to show that plaintiff's injuries were sustained without its negligence; that it was error to charge the jury that appellant "is required to exercise the highest degree of care" in the transportation of passengers.

1. Section 2100 of the Civil Code declares: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage," etc. Webster defines the adjective "utmost" as follows: "Being in the greatest or highest degree." The noun is defined: "The most that can be; the greatest power, degree, or effort." The expression "highest degree of care" is no stronger than the statutory requirement "utmost care." The instruction in this regard was not error. In *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 55 Pac. 324, this ²⁸² court said: "The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care." This is the language of the instruction, and is a correct statement of the law.

2. That part of the instruction relating to the presumption of defendant's negligence is attacked on the ground that no such presumption arose because the injury was the result of a collision between two cars owned and operated by two different defendants independent of each other. *Harrison v. Sutter Street Ry. Co.*, 134 Cal. 549, 66 Pac. 787, is cited as decisive of the question. In that case the injury was caused by a collision between the railway cars and a wagon belonging to the National Brewing Company. It was held that no presumption of negligence arose in a suit against the railway company and the owner of the wagon as between themselves. The trial court refused to instruct the jury, at plaintiff's request, that a presumption of negligence arose against both defendants. The court held that this could not be a law. The court said: "The bedrock of this principle of presumption of negligence arising from the fact of the injury is that of probabilities, and, in the very nature

of things, it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants totally independent of each other, it being an open question as to which defendant had control of the particular instrumentality that caused the injury." And the court further said: "If it was the wagon, it was an instrumentality not under the management of the railway company; and if it was the car, it was an instrumentality not under the management of the brewing company. And in either case, as to the other defendant, the rule of law here laid down by the law-writers cannot be made applicable to the facts." But the question now here was not decided.

In *Tompkins v. Clay Street Ry. Co.*, 66 Cal. 163, 4 Pac. 1165, it was decided that in an action by a passenger against two carriers of passengers, for damages caused by a collision, no presumption of negligence arises from the mere fact of the injury as against the proprietor of the vehicle not occupied by the plaintiff. The question now here is as to the presumption ²⁸³ against the proprietor of the vehicle occupied by the plaintiff. Clearly the rule applies to such proprietor. As stated in *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 60 Pac. 780: "A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and the injury was caused by the manner in which defendant used or directed the instrumentality under its control." If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense, but the presumption of defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency. The instruction did not shift the burden of proof of the whole case to defendant. It was nothing more than saying that, upon the particular issue, plaintiff has established negligence on defendant's part, and defendant must meet this proof by "showing that the injury was without any negligence on its part." Nothing short of such proof would meet the proof of negligence, of which the law presumes defendant guilty, and it was not error to so charge the jury. This view in no wise contravenes the doctrine as to burden of proof so clearly stated in *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, and as also provided by the Code of Civil Procedure sections 1869, 1981. This presumption, which the law raises from proof of certain facts, is "satisfactory

if uncontradicted" (Code Civ. Proc., sec. 1963); and to meet it the evidence of defendant must show to the satisfaction of the jury that defendant "was without any negligence on its part": *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 55 Pac. 324; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173, 60 Pac. 780, and cases cited; *Shearman and Redfield on Negligence*, sec. 59; *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199, 23 N. E. 462. It is not true, as contended by appellant, that the rule has been applied only where questions arose on the sufficiency of the evidence to sustain the verdict and on motions for nonsuit. The rule is a sound one as applied to the case when submitted to the jury. As said in *Shearman and Redfield*, the peculiar circumstances of this class of cases, when made to appear, "afford reasonable evidence in the absence of explanation by the defendant that the accident ²⁸⁴ arose from want of care"; and in such case, as was said in *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75, "the onus then rests upon the defendant to prove that the injury was caused without his fault."

The judgment and order should be affirmed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Henshaw, J., Temple, J., McFarland, J.

Street Railway Companies are common carriers of passengers, and as such are bound to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged: *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Leavenworth Electric R. R. Co. v. Cusick*, 60 Kan. 590, 72 Am. St. Rep. 374, 57 Pac. 519. Injury to a passenger on a railroad has been held to raise a presumption of negligence on the part of the company: See *Steele v. Southern Ry. Co.*, 55 S. C. 389, 74 Am. St. Rep. 756, 33 S. E. 509; *McCafferty v. Pennsylvania R. R. Co.*, 193 Pa. St. 690, 74 Am. St. Rep. 690, 44 Atl. 435; monographic note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495. And this rule has been applied to street railway corporations: See *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729. Compare *Chicago Street Ry. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238; *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021.

As to a *Street-car Passenger's Right* of action for injuries sustained from a collision of the car with a railway train, see *Chicago etc. R. R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028. Where a railway passenger is injured by a negligent collision of his train with that of another company, he may maintain an action against either company: *Wabash etc. Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791.

ESTATE OF MILLS.

[137 Cal. 298, 70 Pac. 91.]

CHILDREN, Legitimacy of—Cohabitation, What is.—Under a section of the Code of Civil Procedure of California declaring that the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate, the word "cohabiting" means the living together of a man and woman ostensibly as husband and wife. (p. 178.)

CHILDREN, Illegitimacy—Proof of by Mother.—The presumption that children born in wedlock are legitimate cannot be overcome by the evidence of their mother that, though residing in the same house with her husband, she did not have sexual intercourse with him for a series of years antedating their birth, but did, during such years, submit to such intercourse with another, whom she claims to be their father. This rule is not abrogated by a statutory provision declaring that neither the parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses, nor by another provision to the effect that the presumption of legitimacy can be disputed only by a wife or husband or the descendants of one or both, and that illegitimacy in such case must be proved like any other fact. (p. 179.)

John J. Jury, John E. Richards, H. A. Powell, and Archer Kincaid, for the appellants.

Wilson & Wilson, George C. Ross, and Edward P. Fitzpatrick, for the respondents.

²⁹⁸ The COURT. This case comes here on appeal from a judgment in favor of respondents Chatham and Gardiner and against appellants. The judgment-roll is accompanied by a ²⁹⁹ bill of exceptions containing the evidence and rulings of the court. The action was commenced under section 1664 of the Code of Civil Procedure, by respondents Robert Schofield Chatham and Maria Elizabeth Chatham Gardiner, who claimed, and now claim, to be illegitimate children of Robert Mills, deceased, adopted as such under and in the manner provided in section 230 of the Civil Code.

The facts may be briefly stated as follows: Rowland and Diana Chatham were married in Cincinnati, Ohio, in 1851. Some time afterward, between 1852 and 1854, they came to California, and on their journey by steamer met and became acquainted with Robert Mills, deceased. Roland Chatham was a miller by trade, and after arriving in California he lived with his wife, Diana, in Sacramento City for a few months, and then moved to San Francisco, where, after living

at various places, he settled with his family at a place called the Potrero, where the family lived until his death, in 1885. Diana Chatham, while living at the Potrero with her husband, became the mother of three children, to wit: George William Chatham, who was born in February, 1862, at the Potrero, and is admitted to be the son of Roland Chatham, deceased; Robert Schofield Chatham, who was born in September, 1865; and Maria Elizabeth, who was born in May, 1869. The latter two children are now claimed to be the illegitimate children of deceased Robert Mills, and not the children of Roland Chatham, deceased. During all the married life of Roland Chatham, and during the time of the birth of the three children, he slept at the one home of himself and his wife, Diana, lived there and ate at the table with his wife and family. He does not appear to have ever been absent from the state or from his family for any length of time. In the family Bible, after the entries of the dates and places of birth of the husband and wife, and the date of their marriage, under the head of "Births," appears the following:

"George William Chatham, born February 10th, 1862, San Francisco, U. S. Robert Schofield Chatham, born September 1st, 1865, San Francisco, U. S. Maria Elizabeth Chatham, born May 19th, 1869, San Francisco, U. S."

The respondents during the lifetime of Roland Chatham always bore his name, and their names were entered as "Chatham" at the various schools where they attended. While ³⁰⁰ respondent Robert was a growing boy he slept a large portion of the time with Roland Chatham, the husband of Diana. Respondents always called Roland Chatham "Dad." Roland Chatham had a family (or group) picture taken while the respondents were small children, in which himself and wife and the three children appear. This picture was hung up in the family home of the Chathams. Roland Chatham died in 1885 in the little bedroom where he usually slept at the family home at the Potrero. Diana, the widow, attended the funeral with the three children, in the mourner's carriage. After the death of Roland Chatham, the property which had been occupied as a home was conveyed by the three children to their mother, Diana. This deed was made in July, 1891, and recited that it was made between "George W. Chatham, Robert S. Chatham, and Maria E. Chatham, the sons and daughter of Roland and Diana Chatham respectively." In January, 1897, Robert Mills signed a statement in writing as follows:

"Belmont, January 8, 1897.

"Knowing that death is certain and often sudden, I make this statement. I never had but one wife, Miranda E. Mills. I leave no children. I have left no will and wish the distribution of my estate to be made according to the laws of this state.

ROBERT MILLS."

On April 26, 1897, Robert Mills died. This proceeding was commenced in August, 1899.

Section 230 of the Civil Code provides as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." And section 193 of the same code provides that: "All children born in wedlock are presumed to be legitimate."

It was therefore necessary for respondents, as the very foundation of their case, to allege and prove that they were illegitimate children of Robert Mills, deceased. They called their mother, Diana, as a witness in their behalf, and, under appellants' objection that the witness was incompetent, and ³⁰¹ that the evidence was inadmissible under the code, she was permitted to testify that in 1862, before either of the respondents were begotten, she ceased to occupy the room with her husband, and that she never had sexual intercourse with him after that time, nor with anyone else except Robert Mills; that Robert Mills agreed with witness in 1863 to live with her as husband and wife, and that Roland Chatham knew of the agreement; that thereafter the witness slept with Robert Mills in a bedroom in the home of herself and husband, and adjoining the bedroom of her husband; that there was a door between the room occupied by witness and Mills and that occupied by her husband; that she pushed the bed up against the door during the night; that her husband knew that Mills was habitually having sexual intercourse with her, but remained friendly with Mills, and sat at the family table and ate with him; that her husband knew that Mills was the father of respondents. Appellants objected in various ways to the testimony, and saved their exceptions to the rulings admitting it. The court erred in the rulings complained of as to the above evidence. It is provided in subdivision 5 of section 1962 of the Code of Civil

Procedure that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." The word "cohabiting," as used in the above section, means the living together of a man and woman ostensibly as husband and wife: 1 Bishop on Marriage, Divorce, and Separation, sec. 1669, note 1.

The evidence received was for the purpose of proving a fact which by the above provision is made indisputable.

The section not only lays down a rule by which we must be governed, but the rule is the one supported by the best authorities, on the ground of public policy. It is the rule given by the text-writers and the great weight of authority. When Robert Faulconbridge made the claim that his older brother was the illegitimate son of Cœur de Lion, the rule is thus stated:

"King John.—Sirrah, your brother is legitimate;
Your father's wife did after wedlock bear him;
And, if she did play false, the fault was hers;
Which fault lies on the hazards of all husbands
That marry wives."—(King John, act I, scene 1.)

³⁰² It is said in Greenleaf on Evidence (Lewis' edition, 1896, volume 2, section 1): "The husband and wife are alike incompetent witnesses to prove the fact of nonaccess while they lived together." The rule is thus stated by Jones in his work on Evidence (volume 1, section 96): "It is well settled on grounds of public policy affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them, nor are the declarations of the husband or wife competent as bearing on the question."

In a late case in Wisconsin (Shuman v. Shuman, 83 Wis. 255, 53 N. W. 455) the question is extensively discussed and the rule as stated above adopted. In the opinion it is said: "The court rejected as inadmissible all testimony of the statements or admissions of Andrew and Lelia M. Ingle tending to show that they had no sexual intercourse with each other during the time within which it is possible that Frances M. was begotten. The ruling was correct. No rule of evidence is better settled than that husband and wife are alike incompetent witnesses to prove the fact of nonaccess while they lived together." For further authorities to the same effect, see 3 Am. & Eng. Ency. of

Law, title "Bastardy," 2d ed., 878, and cases cited in note 1; *Bell v. Territory of Oklahoma*, 8 Okla. 75, 56 Pac. 853; *Abington v. Duxbury*, 105 Mass. 290; *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498; *Mink v. State*, 60 Wis. 583, 50 Am. Rep. 386, 19 N. W. 445; *Tioga County v. South Creek Township*, 75 Pa. St. 436; 1 *Bishop on Marriage, Divorce, and Separation*, sec. 1179.

It is claimed by respondents that the above rule is not in force in this state by reason of the Code of Civil Procedure (section 1879), which provides that all persons may be witnesses, and that "neither parties nor other persons who have an interest in the event of an action or proceeding are excluded." The above section was passed for the purpose of abrogating the common-law rule which excluded parties from testifying in their own suits or where they had an interest in the subject matter in controversy. It was not intended to abrogate the rules of evidence founded upon the reason and experience of 303 ages. Nor was it intended to break down a rule founded in decency, morality, and public policy. This question has arisen in other courts under similar code provisions, and the courts have uniformly considered the rule of the common law in question unchanged: *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Tioga County v. South Creek Township*, 75 Pa. St. 436; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255.

This court accordingly held in *Estate of Heaton*, 135 Cal. 388, 67 Pac. 321, that the provisions of subdivision 11 of section 1870 of the Code of Civil Procedure, to the effect that evidence may be given of "common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary," was never intended to broaden the common-law rule limiting common reputation as to pedigree to declarations of members of the family.

It is further contended that the provision of subdivision 5 of section 1962 of the Code of Civil Procedure is in conflict with section 195 of the Civil Code, which provides: "The presumption of legitimacy can be disputed only by the husband or wife or the descendent of one or both of them. Illegitimacy in such case may be proved like any other fact."

We do not think the expression "proved like any other fact" was intended to do away with the well-known rules of

evidence and allow all kinds of evidence, whether incompetent, secondary, or hearsay. Any fact in controversy pertinent to the issue may be proved by competent evidence and subject to the rules as to presumptions. Where the law makes a certain fact a "conclusive presumption," evidence cannot be received to the contrary. The proof of any fact must be made by legal evidence subject to the rules as to presumptions and as to incompetency. Illegitimacy may be proved; but it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse. It would require a very plain and express statute to convince us that the legislature intended to do away with a rule founded upon good morals and public policy, and to allow evidence which shocks every sense of decency and propriety.

In this discussion we have not overlooked the fact that the law is not as rigid as formerly in cases of this kind. The ²⁰¹ common-law rule was, that the child of a married woman was conclusively presumed to be legitimate if begotten while her husband was within four seas—that is, within the jurisdiction of the kingdom of England—unless the husband was impotent: Coke on Littleton, sec. 244a.

The modern rule was stated by Lord Langsdale in *Hargrave v. Hargrave*, 9 Beav. 552, as follows: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." And the same rule is supported by the authorities in this country: *Shuman v. Shuman*, 83 Wis. 254, 53 N. W. 455; Thayer on Evidence, appendix "A," p. 540; 2 Lewis' Greenleaf on Evidence, sec. 150. But the above rule does not allow either of the parents to testify to the fact of non-access during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not incompetent, is legitimate.

It is not necessary to discuss other questions in the case.
The judgment and order are reversed.

Hearing in Bank denied.

Proof of the Illegitimacy of Children is considered in the monographic note to *Dennison v. Page*, 72 Am. Dec. 649-654. The general rule is, that neither the testimony of the husband nor of the wife nor of the alleged paramour will be received to show that a child born during marriage is illegitimate, if the husband was not impotent and had opportunity for sexual intercourse with the wife: *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498.

WEBSTER v. NORWEGIAN MINING COMPANY.

[137 Cal. 399, 70 Pac. 276.]

DEATH OF HUMAN BEING—Action for Where He has no Heirs.—Under a statute declaring that an action may be brought by the heirs of a decedent or his personal representative to recover for his death when due to the negligence of another, an action cannot be sustained by a personal representative unless the decedent left heirs at law. (p. 182.)

E. W. Holland, for the appellant.

C. H. Wilson, for the respondent.

³⁹⁹ GAROUTTE, J. The administrator of the estate of Walton Smith, deceased, brings this action against defendant to recover damages for the death of said Smith, the complaint alleging that his death was occasioned by and through the negligence of defendant. There is no allegation in the complaint to the effect that the deceased, Smith, left any heirs and it is now claimed by defendant that the failure to make this allegation renders the pleading fatally defective.

By direct authorization of the Code of Civil Procedure (section 377), the administrator of an estate may bring an action to recover damages for the death of a person, and it has been so held in *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 308; *Burke v. Arcata etc. R. R. Co.*, 125 Cal. 368, 73 Am. St. Rep. 52, 57 Pac. 1065. But the question is now presented, May the administrator of the estate, the personal representative of the deceased, bring the action if there are no heirs? For in this case there being no allegation of the existence of heirs, the court is bound to assume

that there are none. The section of the code quoted declares that the action may be brought by the heirs of the deceased or his ⁴⁰⁰ personal representatives; and when the court is brought to consider the character of the action, the nature of the relief sought, and to whom the fruits of the judgment belong, it is plain the statute only means that the personal representative may bring the action when there are heirs.

The action is entirely statutory. If there were no statute there could be no action. At common law no such right of action existed: *Burke v. Arcata etc. R. R. Co.*, 125 Cal. 368, 73 Am. St. Rep. 52, 57 Pac. 1065. The administrator has the right to bring the action because the statute says so. He is made a statutory trustee to recover damages for the benefit of the heirs. As administrator of the estate he has no interest in the matter, for the fruits of any judgment he may recover do not belong to the estate. Those fruits pass to the heirs as statutory beneficiaries of the statutory trustee. They do not take them by way of succession. This statutory action was given for the benefit of the heirs of the deceased, and for no other purpose. It was enacted in order that they might compensate themselves for pecuniary injury suffered in the loss by death of a relative, and this being so the statute necessarily contemplates that there must be heirs of a deceased. If this deceased had no heirs, then this statute does not apply, and there can be no action; for there can be no statutory trustee if there be neither trust nor beneficiary. As already suggested, the action can only be brought to recover damages suffered by the heirs. The amount of the recovery should be in proportion to the damage they have suffered, and if there be no heirs there can be no damage, for there will be no one injured by the death of the deceased.

There is a dearth of authority in this state upon the question under consideration, but in other jurisdictions the law has been repeatedly declared. In *Stafford v. Drew*, 3 Duer, 627, in speaking to this question, the court said: "These facts are in their nature material and issuable, and in actions like the present are therefore in my judgment just as necessary to be proved upon the trial, and consequently to be averred in the complaint, as the death of the person injured, and the wrongful act or negligence of the defendant as its primary cause." In *Sorensen v. Northern Pacific Ry.*, 45 Fed. 407, the learned judge said: "It cannot be it was contemplated that in ⁴⁰¹ any case the personal representative might recover a judgment for injuries re-

sulting in death and then afterward institute an inquiry as to whether or not there was anyone entitled to the amount recovered on this judgment. If it is necessary to prove on the trial there is a widow and next of kin, this fact should be alleged."

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

The Right of Action for the Death of a human being is entirely statutory, and before a person can recover damages he must bring himself clearly within the terms of the statute: Citizens' St. Ry. Co. v. Cooper, 22 Ind. App. 459, 72 Am. St. Rep. 319, 53 N. E. 1092; monographic note to Brown v. Electric Ry. Co., 70 Am St. Rep. 669-687. Only those named in the statute as proper parties plaintiff can sue: See the note to Brown v. Electric Ry. Co., 70 Am. St. Rep. 672-675.

STEINHART v. SUPERIOR COURT.

[137 Cal. 575, 70 Pac. 629.]

EMINENT DOMAIN—Taking Possession During Pendency of the Proceedings.—A statute authorizing the court in which a proceeding is pending to make an order authorizing the plaintiff to take possession of and use lands and premises sought to be condemned during the pendency and until the final conclusion of the proceeding brought to condemn on paying into court, or giving security for the payment thereof, to be approved by the court, of a sum sufficient to compensate the defendant in case the land is finally taken, or for damages if for any reason the land is not taken, and providing that the defendant may apply to the court for the money, but that its payment to him is an abandonment of all defenses except the claim for greater compensation, is unconstitutional, if the state constitution declares that private property shall not be taken or damaged for a public use without just compensation having been first made or paid into court for the owner. (p. 187.)

EMINENT DOMAIN—Taking of Property, What is.—The taking possession of and using property during the pendency of a proceeding for its condemnation for a public use is a taking of the property within the meaning of a constitutional provision declaring that property shall not be taken or damaged for a public use without just compensation having been first made or paid into court for the owner. (p. 187.)

EMINENT DOMAIN—Fourteenth Amendment.—The provision of the constitution of California declaring that property shall not be taken or damaged for a public use without just compensation having been first made to, or paid into court for, the owner, and that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor is first made

in money, or ascertained and paid into court, irrespective of any benefit, for any improvement proposed by such corporation, is not in conflict with the fourteenth amendment to the constitution of the United States. (p. 187.)

Sullivan & Sullivan, E. A. Bridgford, and Jesse W. Lilienthal, for the petitioner.

Seawell & Pemberton and Morrison & Cope, for the respondent.

575 TEMPLE, J. This is an application for a writ of prohibition to prevent the respondent from making an order in a condemnation suit for a right of way, at the instance and for the Albion Southeastern Railway Company, a corporation, putting such corporation in possession of certain lands of petitioner during the pendency of the proceeding and before the value of the land sought to be taken has been ascertained.

The order is sought pursuant to section 1254 of the Code of Civil Procedure, and waiving some question as to whether **576** the land sought to be condemned is sufficiently described in the petition, it may be assumed that the code provisions have been followed. The main question is whether the section authorizing the court to make an order that such plaintiff may "take possession of and use the land and premises sought to be condemned, during the pendency and until the final conclusion of the proceedings brought to condemn," is constitutional.

To obtain such order the plaintiff must pay into court, "or give security for the payment thereof, to be approved by the judge of such court," sufficient money to compensate the defendant, in case the land is finally taken, or for damages, if for any reason the land be not taken. The defendant may apply to the court for the money, but a payment is deemed an abandonment of all defenses except the claim for greater compensation. In the nature of things, this provision for payment cannot apply to the claim of a defendant for unliquidated damages for the value of the use of the land and damages thereto, if the land be not finally taken. As to such claim, the money is not paid into court for the defendant, but as security only. It is further provided that the deposit shall be at the risk of plaintiff until the court finally awards the money to the defendant, and the clerk and his sureties shall be liable therefor.

In the former constitution the entire provision upon this subject was in these words: "Nor shall private property be

taken for public use without just compensation." In 1861 an act was passed which contained provisions somewhat similar to section 1254 of the Code of Civil Procedure. In 1865 the Western Pacific Railroad Company commenced proceedings under the statute to condemn lands for a right of way through lands owned by Bernard C. Fox. At the commencement of the proceeding the railroad company filed a bond, as required by the act, and obtained an order authorizing it to take possession and to continue in possession pending the proceeding. It took possession and made the usual excavations and fills upon the land. The proceeding was carried to a conclusion and final judgment of condemnation entered. But before final judgment a suit was commenced against the railroad company for damages. The defendant justified under the order permitting it to take and hold possession.

577 On appeal an elaborate opinion was handed down by Sanderson, J., and another by Sawyer, J. Several previous cases are summarily disposed of in the opinion. For instance, in *San Francisco v. Scott*, 4 Cal. 114, the court held that compensation must be made before the citizen can be divested of his rights. "It is not sufficient that the law points out the mode by which damage may be ascertained, and provides the party with a remedy to enforce his right. No such obligation can be imposed upon him. He is entitled to the damages which he has sustained without resorting to a legal tribunal to enforce payment." This, it is said, means only that the damages must be paid before title will pass. Of course, it will be convenient for the person seeking to condemn to postpone that time indefinitely, if in the meantime he can have the use of the property.

These propositions seem to be advanced and maintained in that case:

1. The constitution does not require payment before the taking, but only that it should be provided and made certain without unreasonable delay or expense to the property owner.

2. The court may, on the terms of the statute, authorize the party seeking to condemn to take immediate possession and to use the property pending the proceeding, and such possession does not constitute a taking within the meaning of the constitution, and conversely title will not pass until payment is made.

As far as the present inquiry is concerned, the most important proposition is, that taking possession and using the

property during the pendency of the proceeding is not a taking, within the meaning of the constitution. There was much more plausibility in the contention that, as the constitution then was, compensation need not be actually paid in advance.

The more important proposition was overruled in *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517. The court uses the following language: "The occupation of land by a corporation, for its own purposes, pending the proceeding for condemnation, is a taking of the property within the meaning of the constitution, and that, as the bond does not cover such taking, the section of the statute under consideration is void."

A lengthy opinion was rendered by Mr. Justice Crockett, and the case of *Fox v. Western Pac. R. R. Co.*, 31 Cal. 538, 578 is referred to and confessedly modified. The same doctrine was declared in *San Mateo Waterworks v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. Stockton etc. R. R. Co.*, 53 Cal. 208.

At the time the present constitution was adopted (in 1879), the law as declared by the supreme court was as follows: The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the constitution, but the requirement of the former constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: "Private property shall not be taken *or damaged* for public use without just compensation *having been first made to or paid into court for the owner.*"

The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the constitution, it cannot be authorized until the damage resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner.

This matter was discussed in the case of *Coburn v. Townsend*, 103 Cal. 233, 37 Pac. 202, by Mr. Justice McFarland, who came to the conclusion here reached, but he secured only a limited concurrence.

The case of Spring Valley Waterworks v. Drinkhouse, 95 Cal. 220, 30 Pac. 218, is relied upon as authority for the proposition that section 1254 of the Code of Civil Procedure is valid and in accordance with the constitution. That case really involved the use of the discretion of the court under section 957 of the Code of Civil Procedure. The remarks made, however, may be considered as favorable to respondent here. Perhaps there it is true the money was paid into court for the owner. The amount had been determined by a valid judgment, which had been fully executed by paying the money into court for the defendant, and plaintiff had been put into possession under the judgment. Afterward it was reversed on appeal.

579 I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined and when the property owner cannot take the money. Surely he is not compensated until he may take the money. It is not paid into court for him until he can take it. In the Spring Valley case he might have taken; here he could not, and therefore compensation in such a case is not first made. But this case comes within the purview of the second clause of section 14 of article 1 of the constitution. It is to condemn a right of way which cannot be appropriated until full compensation therefor be made in money or ascertained and paid into court for the owner, and this compensation must be ascertained by a jury, unless a jury is waived as in other cases. These requirements have not been complied with, and could not be. To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding and before the amount of compensation has been determined and paid to the owner or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so.

These provisions are not in conflict with the fourteenth amendment of the federal constitution. All these provisions are but limitations upon the power of the legislature. They do not require the passage of any laws upon the subject, but state the conditions upon which the legislature may authorize the taking of private property for public use. If capable of two constructions, one of which would cause a conflict with the federal constitution, the other must be adopted. Construed with the fourteenth amendment, it would seem that the con-

dition which the constitution expressly imposes upon the legislature in granting the right to private corporations to acquire a right of way under the power of eminent domain must apply to all other persons.

Wherefore, it is considered now here that the said court and the Honorable J. M. Mannon, judge thereof, be restrained and prohibited from making said or any order, authorizing said corporation to take possession or to use said land, or any of it, during the pendency of the proceeding to condemn and acquire a right in and over the same, or any part thereof, **580** until final judgment shall be rendered in said proceeding and the legal title to said right and easement shall pass, as provided in the statute.

Harrison, J., Van Dyke, J., and Beatty, C. J., concurred.

Eminent Domain.—While damages to property occasioned by the exercise of the right of eminent domain may be set off by accruing benefits, such benefits must be real and not chimerical. And in some states, by express constitutional provision, full compensation is to be awarded irrespective of benefits: *Washington Ice Co. v. Chicago*, 147 Ill. 327, 35 N. E. 378, 37 Am. St. Rep. 222, and note; *Beveridge v. Lewis*, 137 Cal. 619, post, p. 188, 70 Pac. 1083. Elements of damages allowable in eminent domain are considered in the monographic note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 291-314. And when the question of the existence of a public use may be considered by the courts is the subject of a monographic note to *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 926-946.

BEVERIDGE v. LEWIS.

[137 Cal. 619, 70 Pac. 1083.]

EMINENT DOMAIN—Right to Condemn a Right of Way to be Transferred to Another.—One not Himself in Charge of a Public Use, nor intending to perform a public service, cannot maintain a proceeding to condemn a right of way for a railway, though he intends, and is under contract, to convey such right of way to a railway corporation which would have been authorized to maintain the proceeding in its own name. (p. 190.)

EMINENT DOMAIN—Fourteenth Amendment.—The provision of the constitution of California declaring that property shall not be taken or damaged for a public use without just compensation having been first made to, or paid into court for, the owner, and that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor is first made in money, or ascertained and paid into court, irrespective of any benefit, for any improvement proposed by such corporation, is not

in conflict with the fourteenth amendment to the constitution of the United States. (p. 191.)

EMINENT DOMAIN—Discriminations Against Corporations.

Under a constitution requiring the uniform operation of general laws and prohibiting discriminations not justifiable by intrinsic differences, the legislature cannot provide that the owner of land which is to be taken for a public use shall receive a smaller sum when it is taken by a natural person than when it is taken by a corporation for precisely the same use. (p. 192.)

EMINENT DOMAIN—General and Special Benefits, What

are.—General benefits consist in the increase in value of, land common to the community generally from advantages which will accrue to the community from the improvement. Special benefits are such as result from the mere construction of the improvement and are peculiar to the land in question. (p. 193.)

Lynn Helm, for the appellant.

John D. Pope, for the respondent.

619 **TEMPLE, J.** The plaintiff, a natural person, commenced this action to condemn a strip of land through premises owned by defendant for a right of way for a railroad. It is averred in the complaint that the board of supervisors of Los Angeles county had granted to plaintiff a franchise to construct and maintain an electric railway in the county of Los Angeles, **620** over and along a route shown upon a map annexed to the complaint. The line described nearly bisects the land of defendant, which is a rectangular tract containing one hundred and twenty acres. The strip sought to be condemned for the right of way is thirty-five feet wide.

The matter was submitted to a jury, which, framing its verdict according to the statute, found that the land to be taken was of the value of four hundred and twenty-nine dollars on the twenty-fifth day of November, 1899, when the proceeding was commenced; that the land not taken would be damaged to the extent of two thousand dollars, and that such land would be benefited by the construction of the proposed road to the extent of five hundred dollars; that fencing the right of way would cost two hundred and thirty-three dollars and sixty-four cents.

A motion for a new trial was denied, and from such order and from the judgment this appeal is taken.

There are many assignments of error, but the two principal points, as I think, are these: 1. The court erred in not allowing defendant to prove that the plaintiff was not the proper party to commence this proceeding; that he was not a person in charge of a public use; and 2. In allowing plaintiff to set off benefits against the damage to land not taken.

The defendant offered evidence tending to show that plaintiff was not engaged in building a railway, and did not contemplate doing so; that he was an employé of the Los Angeles Pacific Railway Company, a corporation, and was endeavoring to secure a right of way for that corporation and not for himself; that he had contracted to convey or to cause to be conveyed, to that corporation such rights as he should obtain, and that property owners along the proposed line, from whom rights of way had been obtained, had, at his instance, conveyed such rights to that company, and that all grading done or road constructed had been at the expense of the Los Angeles Pacific Railway Company, to which plaintiff had agreed to convey the franchise granted to him. Each particular item of the evidence was separately offered, objected to, and objection sustained, and the ruling excepted to.

The offer was in fact to show that plaintiff was seeking to condemn the right of way solely for the purpose of transferring the same at once to the Los Angeles Pacific Railway, which was engaged in building the railway, and which would own and operate it.

621 The evidence was relevant, material, and competent. It was offered for the purpose of showing that the real party in interest was a corporation, with a view of enhancing the damage, as it was claimed that if the corporation was the real party in interest benefits could not be set off against the damage to land not taken, while perhaps if a natural person was in charge of the use and was seeking to acquire such right of way, such benefits might be allowed as a credit. But the point cuts much deeper than that. If the court were convinced that the facts were as contended, the plaintiff should not be allowed to maintain the proceeding at all. It is admitted on all sides, and necessarily, that the proceeding can be maintained only by one who is in charge of a public use and who intends to perform the public service. And further, if the proceedings may be in the name of an agent or other representative, such agency should be stated. One who seeks a right of way to sell merely is not in charge of a public use.

But is there a different rule for estimating the damage when a natural person is in charge of a public use, and is seeking to take property for that use, and when a private corporation is the plaintiff in such a proceeding? In Department it was assumed that section 14 of article 1 of our state constitution discriminates in favor of natural persons and

municipal corporations and against private corporations seeking to condemn land for a right of way, and it was held that the constitutional provision was void because in conflict with the fourteenth amendment to the constitution of the United States, in which it is ordained that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." On reflection, I am satisfied that the section in question neither does nor directs the doing of any of those acts which are forbidden in the fourteenth amendment. It certainly does not authorize the taking of property without due process of law. On the contrary, it provides very ample protection in that regard. Neither does it deprive any person or property of the equal protection of the law. The section reads as follows:

"Sec. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to ⁶²² the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

It is a mere limitation upon the power of the legislature in regard to eminent domain. No private railroad corporation can be permitted to appropriate a right of way over private property until compensation is first made in money, without deduction for estimated benefits from the improvement. It does not authorize any other persons—natural or artificial—to take property on more favorable terms. It is purely negative in its character. If the legislature had prescribed a similar rule for all condemnation proceedings, no one would have thought that this section secured special privileges to or specially burdened any class of persons. A constitutional limitation in itself valid and not in conflict with the federal constitution cannot be made invalid by any act of the legislature. This will, of course, be conceded.

The statute in terms prescribes a uniform rule for all cases: Code Civ. Proc., sec. 1248. It authorizes a deduction for benefits in all cases. It is made to have an unequal operation, because one provision cannot be enforced in cases where a cor-

poration other than municipal is endeavoring to condemn land for a right of way. The difference between the constitutional provision and the code was commented upon in *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958, and it was there held that the effect of both was to impose a greater burden upon corporations other than municipal than was imposed upon natural persons. Conceding the validity both of the statute and of the constitutional provision, and that a natural person could be in possession of a public use which would authorize him to condemn land for a right of way, the conclusion seems logical. It is now, however, earnestly contended that the statute and the constitution together produce an inequality which is forbidden, and it matters not that the effect is the result of the constitution and of the statute together. In Department the difficulty was solved by declaring the constitutional rule invalid. This solution is, however, I am convinced, inadmissible. ⁶²³ The question must be, Can the statute be sustained? And in considering this point we need not look to the fourteenth amendment. Our state constitution equally prohibits discrimination not justified by intrinsic differences, and requires a uniform operation of general laws. The case has been argued entirely from the standpoint of the person in charge of a public use who is seeking to acquire property by condemnation; but it is equally important to consider the question from the position of the property owner. Can the legislature provide that he shall receive a smaller sum for the taking of the land when it is taken by a natural person than when it is taken by a corporation for precisely the same use, especially when the natural person may at once transfer his property to the corporation? Or suppose two cases: Land belonging to one person is being taken by a natural person and other land belonging to him by a corporation, the uses and burdens being in all respects similar. Can the law provide that in one case an allowance shall be made for supposed benefits and not in the other? I think it must be answered that the legislature cannot provide for the one case a less favorable rule than the constitution has provided for the other. They are entitled to the equal protection of the law, or, as was said in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, "the protection of equal laws."

Section 14 prescribes that in all cases of taking property for public use just compensation shall be first made. Under this clause a rule could not be sustained which would not fully

compensate the property owner, but the legislature is not limited to a rule which will only compensate the property owner, and if a law were enacted which would be valid there would be no constitutional difficulty. It must always be for the judiciary to determine whether full compensation is provided. It is necessary, also, that the compensation provided must be in money: 2 Lewis on Eminent Domain, sec. 460, and authorities cited. Of course, this must be so. The constitutional limitation would be of little value if the legislature could authorize payment in any commodity or conjectured advantage it might choose.

Benefits are said to be of two kinds—general and special. General benefits consist in an increase in the value of land common to the community generally, from advantages which ⁶²⁴ will accrue to the community from the improvement: Lewis on Eminent Domain, sec. 471. They are conjectural and incapable of estimation. They may never be realized, and in such case the property owner has not been compensated save by the sanguine promise of the promoter.

Special benefits are such as result from the mere construction of the improvement, and are peculiar to the land in question. The trend of decision is very decidedly to the conclusion that general benefits shall not be allowed as a setoff to damages, even when no statute prescribes a contrary rule: Lewis on Eminent Domain, sec. 471, notes 44, 45. Such appears to be the conclusion of Judge Cooley: Cooley's Constitutional Limitations, 567-580.

The question has been very much discussed, and now in a majority of states the rule is against the credit of such benefits, established variously by constitution, by statute, or by judicial decision.

I am satisfied that in a proceeding to condemn a right of way, at least by a corporation other than municipal or by a natural person, such benefits cannot be set off against damages to lands not taken under our present constitution. Prior to the adoption of the present constitution the supreme court had decided, in a case where it was found that there were no special benefits, but only general benefits, as I have defined them, that such benefits could be set off against damages, and that by this rule the owner was fully compensated: California Pac. R. R. Co. v. Armstrong, 46 Cal. 85. By section 14, involved here, I believe the people intended to overrule this case and other like decisions, so far as applicable to private

railroad corporations. But I think it must be assumed that the intention was to provide in the constitution a rule which would justly compensate the land owner, and that there was no intention of discriminating unjustly against any; and, in my opinion, the rule of the constitution is the just and proper rule, and furthermore, if the allowance of a credit for such benefits were not expressly prohibited they are impliedly prohibited by other clauses of the same section.

In the first place, such benefits are uncertain, incapable of estimation, and future. Compensation must be made in money and in advance. The property owner, therefore, cannot be compelled to receive his compensation in such vague speculations ⁶²⁵ as to future advantages, in which a jury may be induced to indulge.

And then for the reasons usually given for the disallowance of credit for such benefits by the courts when they are not governed by any constitutional or statutory rule; some of the reasons are as follows:

The chance that land will increase in value as population increases and new facilities for transportation and new markets are created is an element of value quite generally taken into consideration in the purchase of land in estimating its present market value. This chance for gain is the property of the land owner. If a part of his property is taken for the construction of the railway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement of value in order to secure the increased facilities which the railroad will afford. If he is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law. The work is not being done for his benefit, but for the pecuniary advantage of those who are constructing it. The law will not imply a promise on his part to pay anything toward it.

His property will be similarly benefited by many of the improvements in the vicinity—by the erection of mills, school-houses, churches, etc.—as will also the railroad after it has been constructed. This expected enhancement of value through the general improvement of the country is a legitimate motive for investing in property or for building a railroad. The improvements made by each one adds to the value

of all the property in the vicinity. The right to share in the general prosperity cannot be taken from anyone for the advantage of others.

In consideration that the community will be benefited, private persons are allowed to exercise the right of eminent domain. The parties constructing a railroad agree to thus serve the public, being allowed to charge for the service. The consent of the public to this use of the right of eminent domain included the consent of the property owner. To compel ⁶²⁶ him to give up or pay full value for his share of the common benefit is to take from him the consideration for which he gave his consent while others are allowed to retain it. In this he is not equally protected by the law: Lewis on Eminent Domain, sec. 471, and authorities cited in note.

Special benefits, as I have said, are such as are peculiar to the property which it is alleged has been damaged, such as are reasonably certain to result from the construction of the work. Illustrations are afforded where a marsh will be drained or levee built which will protect the land from floods. It is generally thought that different considerations must be applied to such benefits. They are not involved here.

Often special benefits, which afford protection to the land, or will at once render it more productive, are taken into consideration in determining how much land not taken will be damaged. Only the arbitrary rule of the statute which requires separate findings of benefit and damage will prevent this. These are matters, however, which need not be determined in this case.

The judgment and order are reversed and a new trial ordered.

Harrison, J., Van Dyke, J., Henshaw, J., and Beatty, C. J., concurred.

McFARLAND, J., dissenting. I dissent and think that the judgment should be affirmed. I adhere to the opinion delivered and the conclusion arrived at in Department. I desire to add only that, in my judgment, the intent of section 14 of article 1 of our state constitution to discriminate against corporations other than municipal, and against them alone, is so obvious as to leave no room for doubt on the subject. Clearly, a constitutional provision must be construed in the light of the law as it stood when the provision was adopted. Now, at the time of the adoption of the provision in question the estab-

lished law of this state was, that in all cases of the exercise of the power of eminent domain—irrespective of the character of the persons seeking to exercise it—the owner of the land taken was entitled to only “just compensation”; and that, in determining what was just compensation, as was said in *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 368, the weight of authority is in favor of “allowing benefits and advantages to be considered in estimating what is a just compensation to be awarded in such cases, and it seems to us that the reasons in support of this view of the subject are unanswerable”: See, also, *California Pac. R. R. Co. v. Armstrong*, 46 Cal. 85. That was the law of the state, and it included the consideration of general as well as special benefits. Now, the purpose of the constitutional provision in question was not to change that judicially determined just principle as to any person except a private corporation; it was to stand as to all other persons, and it forever prohibits the legislature from allowing that just principle to be invoked by such a corporation. If that is not a discrimination founded upon no intrinsic or natural difference, and therefore in violation of the federal constitution, I cannot imagine how such a discrimination could exist.

Eminent Domain.—The provision of the constitution of California for compensation for property taken or damaged under the right of eminent domain irrespective of any benefit, was upheld as constitutional in *Steinhart v. Superior Court*, 137 Cal. 575, ante, p. 183, 70 Pac. 629. If benefits are allowed as offsets to the damage done, only special benefits will be considered: See *Washington Ice Co. v. Chicago*, 147 Ill. 327, 35 N. E. 378, 37 Am. St. Rep. 222, and cases cited in the cross-reference note thereto.

Eminent Domain.—*The Legislature Cannot* exempt from condemnation property owned by a corporation, and make subject to condemnation the same class of property owned by an individual: *Kansas etc. Ry. Co. v. Northwestern etc. Min. Co.*, 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684. On the protection of corporations from special and hostile legislation, see the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 165-182.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

McADAMS v. STARR.

[74 Conn. 85, 49 Atl. 897.]

DOGS—Liability of Administrator for Injuries Inflicted by.—

Under a statute making the owner of a dog liable for injuries inflicted by him, an administrator of a deceased owner of a dog who has exercised acts of ownership over it must be regarded as holding the title thereto, and hence as answerable for its wrongs to the same extent as any other owner. (p. 198.)

Action to recover for personal injuries caused by a dog. Verdict and judgment for the plaintiff, and the defendant appealed.

Aaron T. Bates and Howard W. Taylor, for the appellant.

Charles W. Murphy, for the appellee.

86 **ANDREWS, C. J.** The plaintiff is a lad less than ten years old. He brought this action by his next friend to recover damages for the bite of a dog. The case was tried upon an issue joined to the jury. The plaintiff had a verdict. The defendant has appealed. It is substantially settled by the record that the plaintiff was, by such biting, severely injured.

There really is but one question for this court. Was the defendant liable for the acts of this dog? And this depends upon the question whether or not the defendant was the owner of the dog within the meaning of section 3761 of the General Statutes, so that judgment could be rendered against him personally. The judge instructed the jury that he was. If this is correct, then there is no error.

The dog had been owned by Jarvis Selleck, late of Ridge-

field. Selleck died on the twenty-sixth day of February, 1900, intestate. He had owned the dog for three years. At the time of his death and prior thereto Selleck had owned and occupied a large farm in the said town on which there were many creatures, cattle and other, and among them this dog. Selleck left two sons, Darius and Isaac H. They, after the death of their father, made an arrangement in the nature of a lease of said farm and all the creatures thereon, with one Sturgis Selleck. It was a part of this arrangement that the dog should remain on the farm. The defendant was appointed administrator on the estate of Jarvis Selleck on the sixth day of March, 1900. He ratified and approved the lease of the farm with the creatures thereon, which the sons had made with Sturgis Selleck. The tenant, Sturgis Selleck, caused the dog to be registered. The defendant approved that act and paid the registration fee. The dog injured the plaintiff on the twenty-third day of October, 1900.

It is said in 1 Swift's Digest, *page 444, that on the death of anyone all his personal property vests immediately in the executor; and on *page 457, that when an administrator is appointed, his power and duty is precisely the same as that of an executor. This is indisputably the law, and it can make no difference whether the property is a horse, a dog, or a gold watch. ⁸⁷ The rule is the same in either case. The executor takes his title from the will; an administrator by the letters testamentary: 2 Saund. 47, note 1: Roorbach v. Lord, 4 Conn. 347; Beecher v. Buckingham, 18 Conn. 110, 120, 44 Am. Dec. 580; 1 Woerner on Administration, 409.

The court instructed the jury that the defendant was the owner of the dog within the meaning of the statute on which this action was brought. That was correct.

Counsel for the defendant argued in this court that as the property in a dog is a base property, an administrator might disclaim to be the owner of a dog which had belonged to his intestate, and in such case could not be treated as its owner. It would perhaps be difficult to maintain that proposition; but it has no application in this case. Here the administrator had not only not undertaken to disclaim, but, on the contrary, he had exercised acts of ownership over the dog which did the injury.

There is no error.

In this opinion the other judges concurred.

A Dog is property: See Louisville etc. R. R. Co. v. Fitzpatrick, 129 Ala. 322, 87 Am. St. Rep. 64, 29 South. 859; monographic notes to *Armstrong v. Brown*, 90 Am. St. Rep. 214-216; *Hamby v. Samson*, 67 Am. St. Rep. 288-299. And its owner is liable for injuries caused by it: *Crowley v. Groonell*, 73 Vt. 45, 87 Am. St. Rep. 690, 50 Atl. 546. But see *Martinez v. Bernhard*, 106 La. Ann. 368, 87 Am. St. Rep. 306, 30 South. 901.

Executors.—The common-law powers and liabilities of executors and administrators are considered in the monographic note to *Fletcher v. American Trust Co.*, 78 Am. St. Rep. 171-207.

CARNEY v. HENNESSEY.

[74 Conn. 107, 49 Atl. 910.]

ADVERSE POSSESSION—Evidence of.—It is error, where there is a claim of property based on adverse possession, to sustain an objection to a question asking who, if anyone, during a time designated made use of the land in controversy. (p. 202.)

EVIDENCE.—The admissions of an agent should not be excluded from evidence on the ground that the principal is not bound by them unless he had knowledge of them. (p. 202.)

PRINCIPAL AND AGENT.—The Declarations and Acts of an agent are evidence against his principal if made while executing an authority conferred upon him and relating to his business and within the scope of his authority. (p. 202.)

ADVERSE POSSESSION—Knowledge of the Owner Need not be Proved.—If the owner of real property is ousted of possession and the ouster continues uninterruptedly for fifteen years by open, visible, and exclusive possession in another, it is presumed to be with the knowledge of the owner, and the jury should be told that these facts constitute presumptive notice of adverse possession. (p. 202.)

ADVERSE POSSESSION to Create Title by Prescription need not be under a claim of title. (p. 202.)

THE STATUTE OF LIMITATIONS Against a Person Under Disability begins to run the moment he is disseised, but he is allowed all the time specified in the statute for commencing his action after the disability is removed. (p. 204.)

EVIDENCE.—The Declaration of an Owner of Property as to Where he Intended to draw the line of a lot conveyed by him is inadmissible as against his grantees and their successors in interest. (p. 204.)

COSTS, Error Respecting—How to be Reviewed.—Unless plaintiff appeals from the judgment of the trial court allowing costs, the appellate court cannot consider them, though he files a bill of exceptions. (p. 204.)

Trespass quare clausum fregit. Plaintiff recovered verdict and judgment for one dollar damages, and the defendant appealed. Plaintiff filed a bill of exceptions to the action of the

court in limiting his costs to one doliar and also to the exclusion of certain evidence.

George E. Beers and Frank S. Bishop, for the appellants.

Charles S. Hamilton, for the appellee.

108 TORRANCE, J. The plaintiff and defendants are adjoining proprietors of land in New Haven fronting westerly on State street and running east to Olive street. The plaintiff owns the north lot and the defendants the south lot. The dispute between them relates to the question whether the boundary line, between said lots, runs along the outside face of the southerly wall of the brick building on plaintiff's land, as claimed by the defendants, or whether it runs about a foot and a half, more or less, southerly of the face of said wall, as claimed by the plaintiff. Both lots were owned as one by Joseph Fairchild in 1874, and in October of that year he conveyed the north lot to his daughter, Mrs. Easton. She died in 1876, and the lot came then by descent to her two minor daughters, Josephine and Mary. Josephine came of age in 1888, and Mary in 1889 or 1890; and after this, in November, 1890, they conveyed the lot to Gallagher, who immediately conveyed it to Forsyth, who in 1892 conveyed it to the plaintiff. Joseph Fairchild died testate in 1881, leaving other land of his on State street, which included the south lot now owned by the defendants, in equal shares to his five sons; and said south lot, by mesne conveyances, finally came into the ownership and possession of the defendants in March, 1891. Both parties claimed to own the locus in quo under their respective chain of deeds produced in evidence: and in addition to this the defendants claimed: 1. That they owned it by adverse possession; and 2. That when the deeds of the daughters of Mrs. Easton, of Gallagher and of Forsyth **109** were delivered, as hereinbefore stated, the grantors in those deeds were ousted of possession of the locus in quo. These claims of each party were denied by the other. The evidence produced by each party in the court below tended to prove their respective claims.

The reasons of appeal are based mainly upon alleged errors of the court in its rulings upon evidence, and in its instructions to the jury with reference to the claims of the defendants. These reasons are quite numerous, but, in the view here taken of the case, it will be necessary to consider only a few of the more important of them.

The defendants claimed that at some time before 1881, and after the conveyance of the north lot to Mrs. Easton, a fence was built from the southeast corner of her house to Olive street; that said fence had remained there up to the time this suit was brought; and that the defendants and their predecessors in title, from the time said house and said fence were built, and for more than fifteen years before the bringing of this suit, had been in the exclusive and adverse possession of all the land south of said brick house and said fence. In support of this claim, the defendants offered Mrs. Hayes as a witness. Having testified that she lived in the house now owned by the plaintiff from 1877 to 1881, and that when she went there first the fence aforesaid was then standing, she was asked this question: "During the life of Mr. Joseph Fairchild will you state who, if anyone, made use of the land south of the fence?" The evidence sought for by this question was claimed as tending to prove: 1. Adverse possession of the defendants as claimed; 2. The fact that plaintiff's grantor was ousted of possession at the time the deed to the plaintiff was delivered; and 3. The practical construction put by the parties upon the deeds, the descriptions in which, as to the exact location of the boundary line in question, the defendants claimed, were upon the evidence uncertain and ambiguous. This question was objected to and excluded, on the ground "that it calls for a conclusion of the witness as to what somebody else did, and does not call for any act that she did."

¹¹⁰ This objection should have been overruled. Assuming, as we should, upon this record, that the answer would have been responsive to the question, we think the evidence was clearly admissible for all the purposes for which it was offered, and that its exclusion under the circumstances was harmful error.

The defendants offered evidence and claimed to have proved that the plaintiff, since her purchase of the north lot, had resided thereon only a part of the time, and that the care of the place had been intrusted by her to her brother, who was authorized to and did act as her agent in caring for it, paying taxes and assessments thereon, and having general charge of it as her general agent. In view of this evidence and claim, the defendants offered evidence of certain acts and admissions claimed by them to have been made by this agent during and within the scope of his agency. The court excluded the evidence. The ground of exclusion, so far as it is stated in the

record, is that it did not appear that the plaintiff had any actual knowledge of the claimed acts and admissions of her agent. For aught that appears upon the record, the court was satisfied that a *prima facie* case of agency had been made out by the defendants, for it does not exclude the offered evidence on that ground, but simply on the ground that the plaintiff was not bound by the acts and admissions of her agent unless she had knowledge of them.

This, clearly, was not a sufficient ground for excluding the offered evidence; for it is elementary law that if her brother was her agent, engaged in executing an authority she had conferred upon him, his acts and declarations while so doing, relating to her business and within the scope of his authority, were admissible against her, whether known to her in fact or not. It may be that the court intended to exclude this evidence on the ground that the agency had not been sufficiently shown, but if so, that is not the ground stated.

The defendants complain of the charge of the court to the jury with reference to the question of adverse possession. They say that the jury, in divers parts of the charge, were told, in substance: 1. That such adverse possession must ¹¹¹ have been known to and acquiesced in by the owner, or must have been so far notorious as to have been presumptively within the knowledge of the owner; and 2. Must have been held by the defendants and those under whom they claim, under a claim of title, or with a specific intent to claim the land as their own.

We think the record bears out these claims of the defendants, and that the charge, as a whole, upon these points, was liable to mislead the jury. If the owner of real estate is ousted of possession, and the ouster continued uninterruptedly for a period of fifteen years, by an open, visible, and exclusive possession in another, without the license or consent of the owner, such possession is presumed to be with the knowledge of the owner: *School District v. Lynch*, 33 Conn. 330; and the jury should have been told that such facts, if true, would constitute presumptive notice of adverse possession to the owner: *Wilson v. William*, 52 Miss. 487, 493. Nor was it correct to tell the jury that the adverse possession of the defendants and those under whom they claim must have been made under a claim of title, or under a claim that the land was their own: *Bryan v. Atwater*, 5 Day, 181, 5 Am. Dec. 133;

French v. Pearce, 8 Conn. 439, 442, 22 Am. Dec. 630; Johnson v. Gorham, 38 Conn. 513.

The defendants offered evidence to prove, and claimed they had proved, an ouster from the locus in quo, either of Mrs. Easton or of her daughters during their minority, and complain of the charge of the court with respect to the running of the statute of limitations against the minor daughters. Upon this point the court charged as follows: "If you should find that there has been any sufficient adverse possession and occupation of that property amounting to an ouster of the plaintiff, or a predecessor in title of the plaintiff, but should find that such adverse possession began after the Easton girls . . . came to have a title to that property, . . . then you are not to regard the fifteen years of the statute as beginning to run until the date of the transfer from these children to a successor in title, their grantee. Their infancy constitutes a disability which suspends the operation of the statute, if their right of entry accrued during their minority. ¹¹² . . . But if you find . . . any adverse possession sufficient to amount to the requirements of the law, and that it first occurred while the daughters of Mrs. Easton were minors, why, then, the practical consideration is that the statute of fifteen years does not begin to run until they make a conveyance of their interest, which I may say would make it impossible for these defendants to have gained their title by the necessary, continuous occupation for fifteen years; this deed having been given by these daughters of Mrs. Easton in 1890, there would be no question on this subject of adverse possession; it would be decisive if you were to find that, though there were adverse possession, the statute did not begin to run, under the instructions I have given you, until the deed from" the two daughters.

The title to the north lot devolved by descent upon the minor daughters in March, 1876. They, when of full age, conveyed to Gallagher on the 20th of November, 1890. By this charge the jury were told, in effect, that if the defendants and those under whom they claimed had ousted the minor daughters in April, 1876, and had continued such ouster down to the date of this suit in August, 1898, they could not thereby legally acquire title to the locus in quo; in other words, that under such circumstances the defendants could acquire no title until they had continued the ouster for fifteen years after the deed to Gallagher in November, 1890.

That, clearly, is not the law. The court told the jury that if the adverse possession began after the daughters got title, and during their minority, the statute did not run against them while minors. This is not true. "The statute always begins to run against a man the moment he is disseised, whether he is under a disability or not; all the difference is, that an additional time is allowed where a disability exists, after the removal of it": Swift, C. J., in *Bunce v. Wolcott*, 2 Conn. 27, 33; *Griswold v. Butler*, 3 Conn. 227. This part of the charge was thus clearly wrong, and may well have misled the jury to the prejudice of the defendants upon a material point in the case. For this, and the other errors already considered, we think a new trial should be granted; and in ¹¹³ this view of the case we deem it unnecessary to consider the other assignments of error, as most, if not all, of them appear to be either not well founded, or not important enough to merit further consideration.

A bill of exceptions allowed by the trial court for the plaintiff remains to be considered. The bill presents two questions: The first relates to the admissibility of the evidence of Henry C. Davis, and the second to the rulings of the trial court upon the question of costs.

Davis, a witness for the plaintiff, testified to declarations made by Joseph Fairchild, as to where he intended to draw the line between the defendants' lot and the plaintiff's lot; and because it was simply a declaration of what he intended to do, the court excluded it. Under the circumstances, we think the ruling was correct.

The plaintiff took no appeal from the judgment of the trial court upon the question of costs, and in the absence of such appeal the second question presented by the bill of exceptions cannot be considered: *Watson v. New Milford*, 72 Conn. 561-567, 77 Am. St. Rep. 345, 45 Atl. 167.

There is error and a new trial is granted.

In this opinion the other judges concurred.

Adverse Possession.—Actual, continuous, visible, notorious, and hostile possession of lands raises a presumption of notice thereof: *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303, 35 N. E. 509; note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162. The true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice: *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454.

The holding of the principal case that adverse possession need not be under a claim of title is palpably erroneous. Claim of title is the first essential of adverse possession: See the notes to *De Frieze v. Quint*, 28 Am. St. Rep. 158; *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38, 28 South. 402; *Baber v. Henderson*, 156 Mo. 566, 79 Am. St. Rep. 540, 57 S. W. 719; *Bond v. O'Gara*, 177 Mass. 139, 83 Am. St. Rep. 265, 58 N. E. 275. Possibly the court confused claim of title with color of title: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 703.

The Declarations and Admissions of an agent in the course of a transaction are admissible against his principal: *Plymouth County Bank v. Gilman*, 4 S. Dak. 265, 46 Am. St. Rep. 786, 56 N. W. 892; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327.

STATE v. YANZ.

[74 Conn. 177, 50 Atl. 37.]

EVIDENCE—Res Gestae.—A declaration made by a wife shortly after the shooting of a man by her husband in the nature of an endearing expression toward the man shot is not a part of the *res gestae*, and therefore not admissible in favor of the husband. (p. 206.)

JURY TRIAL.—Where Inconsistent Instructions are Given to a jury, it will be presumed that those last given were accepted by them as controlling. (p. 207.)

MURDER OF AN ADULTERER.—The Law Deems the Husband's Passions excited by surprising his wife in the act of adultery so far uncontrollable that if he kill her paramour on the impulse of the moment, and no actual malice is disclosed, none should be imputed, and while the husband is not justifiable, he is not a murderer. (p. 207.)

MURDER—Killing of One Erroneously Believed to be an Adulterer.—If a husband surprises his wife and a man in such position and circumstances as to create in the husband's mind a reasonable belief that they are committing an act of adultery, the killing by him of such man is not made less justifiable by proof that no adultery was committed. (p. 208.)

Indictment for murder. The defendant at the trial sought to prove, chiefly by his own testimony, that he discovered his wife and the decedent in such position and circumstances as indicated they were committing adultery; that he ran home, got his rifle, returned, found the parties in still more compromising position, and that in rushing upon them through the bushes, his rifle was accidentally discharged and the man killed.

The wife of the defendant, who was greatly excited, was as-

sisted to the house of a neighbor, and there laid upon a lounge. Defendant sought to show that at that time she used an endearing expression respecting the deceased, but the evidence was excluded. Verdict and judgment, murder in the second degree, and the defendant appealed.

William C. Case and Jacob P. Goodhart, for the appellant.

William H. Williams, state's attorney, and Alfred N. Wheeler, assistant state's attorney, for the appellee.

179 BALDWIN, J. There was no error in excluding the question put to Mrs. Week. It called for mere hearsay. The homicide had taken place and Mrs. Yanz had left the scene of the transaction. Her declarations could not have served to characterize any contemporaneous act, and therefore could not be claimed as part of the *res gestae*. That she could not be compelled herself to take the witness-stand was no cause for their admission.

The trial court in its charge to the jury used this language: "If the accused saw his wife in any such situation as he has described, he had at least a legal right to interfere and separate them, and to carry with him a weapon for defense against any possible attack. And further, if, in pushing his way through the bushes, and under the excitement naturally and ordinarily to be expected under the circumstances, the rifle was accidentally discharged, and the man thus met his death, then the homicide was by misadventure, and the verdict should be 'Not guilty.'" "There is one kind of provocation, gentlemen, which is of such a grievous nature that the law concludes it cannot be borne in the first transport of passion. This is where or when a man finds **180** another in the act of adultery with his wife; when, if he kills him in the first transport of passion, thereby aroused, he is only guilty of manslaughter. The law does not hold him altogether guiltless of crime; to kill even in the first transport of passion, when under that highest and strongest provocation, is in law criminal. It is manslaughter, the lowest form of criminal homicide; not murder. The adulterer under our law has a right to live; and the injured husband has no legal right to kill him, even in the first transport of passion aroused by finding him in the act. To have the effect of reducing the homicide from murder to manslaughter, the husband must find the adulterer in the act of adultery. The finding may be by any such observation of the circumstances and of the situation of the

guilty parties as justifies the belief that adultery is being committed. Knowledge that the adultery is at the time being committed is sufficient; but if the husband, merely hearing that the adultery had already been accomplished, or merely observing the situation which leads to the belief that adultery has been accomplished, pursues and kills the offender, it will be murder. The witnessing of a passing fact is regarded as having a greater tendency to excite a transport of passion than the mere hearing or the mere belief that it has been accomplished. If, in fact, no adultery was going on, and the husband is mistaken as to the fact, though the circumstances were such as to justify a belief, even, of adultery, the offense would not be reduced to manslaughter. The husband must judge at his peril that the jury may find that he was mistaken, and so find him guilty of murder instead of manslaughter."

There are inconsistent expressions in these instructions, but it is to be presumed that those used last were accepted by the jury as controlling; and they were the least favorable to the accused.

In case, then, they believed so much of the defendant's testimony as described, the circumstances in which he found his wife and Goering together, and the effect which they produced and were reasonably calculated to produce upon ^{his} his mind, but disbelieved his statement that the gun was accidentally discharged, the charge gave them to understand that if the act of adultery was not in fact committed, the killing was murder.

The law justifies a jury in calling it but manslaughter when, on finding his wife in the act of adultery, a man, in the first transport of passion, kills her paramour. This is because from a sudden act of this kind, committed under the natural excitement of feeling induced by so gross an outrage, malice, which is a necessary ingredient of the crime of murder, cannot fairly be implied.

The excitement is the effect of a belief, from ocular evidence, of the actual commission of adultery. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.

The crime of murder in the second degree, under our statute, section 1399, rests upon implied malice. It is not sufficient to

establish merely a criminal intent followed by a homicide. Malice is not to be implied if the fatal act was the sudden result of what the law deems either a sufficient provocation or an uncontrollable passion naturally excited by the circumstances of the occasion: *State v. Johnson*, 41 Conn. 584, 587, 588. The law deems a husband's passion, excited by surprising his wife in the act of adultery, so far uncontrollable, from the frailty of human nature, that if he kill her paramour on the impulse of the moment, and no actual malice is disclosed, none ought to be implied. He is not justified; but he is not a murderer. The reason of this rule of law being the existence of an uncontrollable passion, naturally induced, it must logically follow that it suffices if such a passion has been naturally induced in the mind of the slayer by the sight of his wife in the embrace of the man whom he killed, and a reasonable belief of her guilt, formed under circumstances such as those to which the accused testified in the present case. If the jury believed this testimony, or so much of it as showed a state of facts which, in their ¹⁸² opinion, justified and produced a reasonable belief on the part of the accused that adultery was being committed when the shot was fired, then, there having been no proof of actual malice, although they may also have believed that it was fired intentionally, the natural excitement of passion and want of premeditation make the offense manslaughter: *Morris v. Platt*, 32 Conn. 75, 83.

There is error, the judgment is set aside, and a new trial is ordered.

In this opinion Torrance and Hall, JJ., concurred.

HAMERSLEY, J., dissenting. The particular passage of the charge claimed to be erroneous is this: "If, in fact, no adultery was going on, and the husband is mistaken as to the fact, though the circumstances were such as to justify a belief, even, of adultery, the offense would not be reduced to manslaughter."

The statement is correct. The particular form of manslaughter the court was called upon to explain was this: An intentional killing in a transport of passion induced by an immediate wrong done to the killer by the person killed, which the law deems to be of such nature that the ordinary man is unable, under the first sting of its infliction, to control a natural impulse to punish the offender. Such an injury, if unprovoked, constitutes a provocation which may render the immediate killing of the offender, in the transport of sudden

anger caused by the injury received, manslaughter, and not murder.

It is a principle common to most systems of jurisprudence, arising from essential conditions of life, that the punishment for unjustifiable, intentional killing, should be less severe when the fatal blow is impelled by a transient rage reasonably induced by and immediately following a wrongful act done by the person killed to the slayer. Such wrongful act constitutes legal provocation, which demands the milder punishment; that is, under our law reduces murder to manslaughter.

¹⁸³ It should, however, be remembered, that to call for the milder punishment the killing must be in fact the result of a sudden rage, difficult for the ordinary man to control, directly induced by a grievous injury. If, in fact, it is the result of the cruel spirit of revenge that must have life for a wrong, it is murder, no matter what the provocation may be. In drawing the line between the crimes of murder and manslaughter, the law utterly repels the notion that killing in revenge can be less than murder. The cases in which particular facts have been held to show legal provocation point to a principle, common to all, by which each is determined, and suggest its foundation—namely, when the mind of the slayer is not possessed by that conscious cruelty indicated by voluntary killing, but by a sudden transient rage, being the natural product of an injury then done to him by the person killed, the offense may be manslaughter.

Mere rage is insufficient; it must arise directly from an injury then received, which must be as real as that caused by a severe battery. Mere insult is insufficient in law to produce this rage, unless it involves some grievous injury—not a fanciful one such as may result from mocking words or gestures, but a substantial injury such as may be caused in some conditions of life by an unpunished personal affront, or such as may be suffered by a husband or father in the degradation of his wife or child. It is the combination of adequate insult and injury received, of sudden and uncontrollable transient rage thereby naturally produced, and of unlawful killing directly resulting from that rage, which marks such killing as manslaughter.

The essence of the common law as affecting the distinction between murder and manslaughter (excluding some arbitrary tests) is this: Murder implies the presence, as dominating a voluntary act causing death, of an inhuman or unnaturally cruel state of mind: manslaughter implies its absence. It is

thus stated by Lord Holt in 1707: "He that doth a cruel act voluntarily, doth it of malice prepensed": *Regina v. Mawgridge*, 1 Kelyng, 119 et seq. Sir J. F. Stephen characterizes this definition of malice aforethought as correct ¹⁸⁴ and happy, and with the insertion of the words, "or cruelly reckless," as solving nearly all questions as to the distinction between murder and manslaughter: 3 Stephen's History of Criminal Law of England, 70, 73. Russell thus explains what may be involved in a cruel act: "Violent acts of resentment, bearing no proportion to provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice": 1 Russell on Crimes, 9th Am. ed., 713.

Intentional unlawful killing is necessarily a cruel act which implies murder, but when the person killed is himself the aggressor, through giving a provocation adequate to produce a sudden anger and impulse to punish the wrong, sufficient to dominate the will of the killer, the inherent cruelty of the act is so far modified as to make the offense manslaughter. Provocation, therefore, is legally effective, because for the moment it prevents, subdues, or excludes from the mind of the criminal actor, that unnatural cruelty which is the earmark of murder, through the controlling presence of a natural rage immediately induced by an adequate injury. The essential test of an adequate injury is its inherent and judicially known capacity, under existing social conditions, to cause such rage, as a rule, when inflicted on the ordinary man.

The conditions to which this part of the charge applied were these: 1. An admittedly intentional, unlawful killing; 2. In a transport of rage; 3. Induced by an injury and insult, done to the defendant, by adultery committed with his wife, in his presence. To make the offense manslaughter the injury must have been done. Intentional unlawful killing in a rage is murder, and not manslaughter. Anger, thirsting for the blood of an enemy, is in itself an earmark of murder, no less than revenge or brutal ferocity; but when it is provoked by the wrongful act of the person slain, who thus brings upon himself the fatal blow, given in the first outbreak of rage caused by himself, the offense is manslaughter; not only because the voluntary act is, in a way, compelled by an ungovernable rage, but also because ¹⁸⁵ the victim is the aggressor, and his wrong, although it cannot justify, may modify, the nature of the homicide thus induced. The court therefore correctly told the jury that to make the offense manslaughter the injury claimed as a

provocation must have in fact been done. Our law of homicide recognizes no provocation as legally competent to so modify the cruelty of intentional, unlawful killing as to reduce the offense to manslaughter, except the provocation involved in an actual and adequate injury and insult. A different rule of provocation applies when the killing is not intentional, as where it results from the use of force not intended and not naturally adapted to cause death. But where the killing is both intentional and unlawful, the only legal provocation is that given by an actual injury and insult.

The decision of the majority of the court is based on the assertion that the intentional, unlawful killing of an innocent person who has done the slayer no wrong, may be manslaughter; or, in other words, an actual injury done to the slayer is not essential in order to reduce such killing from murder to manslaughter.

I find no authority in our law for this assertion. During the three centuries in which the distinction between the crime of murder and that of manslaughter has been developed and established, there is, so far as I have been able to discover, no dictum of jurist, or decision of court, which has failed to recognize the necessity of an actual injury and insult given by the killed and suffered by the killer, as necessary to the reduction of intentional, unlawful killing from murder to manslaughter. It seems to me unquestionable that the decision involves a clean cut and radical change of existing law. I think such a change would be unwise and inconsistent with the considerations of public policy that underlie our law of homicide. It is, however, unnecessary to discuss the wisdom of the change, for it is one within the province of the legislature and not of the court to make. The only authority cited in the opinion of Judge Baldwin, as supporting its position that a belief in an injury may be equivalent in effect in this case to an actual injury, is the ¹⁸⁶ case of *Morris v. Platt*, 32 Conn. 75, 83. If the court may properly change the law heretofore clearly established, so that an honest belief in an imaginary injury can make manslaughter of murder, then there is no need for the citation of authority; its ipse dixit is sufficient; but as the law stands the case cited is wholly irrelevant. In *Morris v. Platt*, 32 Conn. 75, 83, the court was dealing with a homicide claimed to have been committed in the exercise of the right of self-defense, and correctly stated the law applicable to such a case—namely, killing in self-defense is not a crime. The right

of self-defense includes the right of protection against a reasonably apprehended danger; otherwise the right of self-defense would in most cases be an impotent right. A well-grounded apprehension of danger, as well as a certainly existing danger, may justify a killing in self-defense. The lawfulness of the act is determined, not by the fact of an actually existing danger, but by the fact of an honest, reasonable and well-grounded belief in its existence.

In this case the court is dealing with an admittedly intentional and unlawful killing, and the crime is murder unless the person so intentionally killed had himself given a provocation consisting in an actual grievous injury and insult. There is no analogy between the two cases. The principle governing the former case—that the right of self-defense justifies killing done to prevent a reasonably apprehended danger—is well settled. The principle governing this case—that intentional, unlawful killing is murder unless provoked by an adequate injury and insult—is equally well settled.

The argument of the opinion seems to be this: A reasonable belief in an existing danger may justify killing in self-defense, and in such case the reasonable belief is equivalent to the fact of existing danger; e. g., a reasonable belief in a nonexisting injury is equivalent to the actual injury essential to reduce the crime of intentional, unlawful killing from murder to manslaughter. Such logic is not convincing. It is plain that unless the alteration in the law announced in the majority opinion is justifiable, that the error imputed to the charge cannot be sustained.

187 That alteration provides that intentional, unlawful killing, done in anger reasonably aroused, may be manslaughter, although the killer has received no injury and the person killed is innocent of any wrong. Such alteration seems to me plainly unjustifiable.

If there is any mistake in the particular passage of the charge, it is the statement of a general rule not material in the state of evidence before the jury. The only question in respect to the alleged injury claimed as a provocation was the truth or falsity of the testimony describing the positions of the defendant's wife and the deceased just prior to the firing of the fatal shot. The defendant testified that he discovered his wife upon the ground, lying on her back with her clothes up, and the man in the position detailed, and which the finding says justified the belief that they were engaged in the act of

adultery. There was no qualifying evidence. If the testimony was credible, adultery had been committed and the injury alleged had been given. There was, therefore, no occasion to state the rule of law applicable to a state of facts which might justify a reasonable belief that adultery had been committed and also show that in fact it had not been. The court might properly have omitted reference to a rule applicable to the state of fact as claimed; or, possibly, if the reference were made, might properly have added that if the conduct of the deceased with the prisoner's wife did not satisfy the jury that adultery had been committed, yet the conduct detailed was in itself a grievous injury and insult, and a legal provocation.

That such conduct is a legal provocation seems to me demonstrable; but such question is not now involved and no claim in respect to it is made. If it were a mistake to state the rule of law governing a case where there was a reasonable belief in adultery, which was in fact unfounded, the mistake was harmless, and would not be less harmless if the qualification suggested had been made. The record shows with certainty that the only question before the jury as to this part of the case was the credibility of the defendant's testimony as to the fact of adultery. If credible, ¹⁸⁸ adultery had been committed and the offense was manslaughter. Upon this question the charge of the court is clear, full and impartial. It could not have been misunderstood, and could not have been affected by the statement, in the general definition of legal provocation, as to the necessity of proving the fact of adultery. Neither court nor counsel contemplated the contingency of the jury finding as a fact the circumstances under which the parties were claimed to have been discovered, and also finding that no adultery had been committed. There was no such contingency—it involved an absurdity approaching grotesqueness; and yet a new trial cannot be lawfully granted without gravely assuming the probability of the verdict having been influenced by such an absurdity. A mistake, or even an error, in the passage of the charge objected to, would relate to a state of facts not before the jury, was rendered harmless by those portions of the charge directly dealing with the evidence and could not have affected the conclusion of the jury. The defendant has had a fair trial. The charge of the court is correct in law, and full and impartial in its review of the evidence and in its presentation of all claims made by the parties; and even if the passage objected to might properly have been omitted or qualified, there is no

ground for a new trial: *State v. Griswold*, 73 Conn. 95, 100, 46 Atl. 829. I think there is no error and that a new trial should be denied.

In this opinion Andrews, C. J., concurred.

HOMICIDE—KILLING OF ADULTERER.

I. When Manslaughter.

a. Under Statutes.

II. When Murder.

III. Killing Adulteress.

IV. Evidence.

I. When Manslaughter.

The rule of law is well established that if a husband detects his wife in the act of adultery and immediately slays her, or her paramour, the law does not entirely justify or excuse him, but holds the provocation sufficient, as matter of law, to reduce the killing to manslaughter. In other words, illicit sexual intercourse with the wife of another is such a wrong, and so obviously calculated to bring on a difficulty with the husband, that the law recognizes it as a provocation sufficient to reduce the killing of the adulteress or her paramour, or both, by the husband, immediately upon detecting them in the act, to manslaughter: *Hooks v. State*, 99 Ala. 166, 13 South. 767; *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92, 21 South. 211; *Jones v. People*, 23 Colo. 276, 47 Pac. 275; *Mays v. State*, 88 Ga. 399, 14 S. E. 560; *State v. Senegal*, 107 La. 452, 31 South. 867; *State v. John*, 8 Ired. 330, 49 Am. Dec. 396; *State v. Samuel*, 3 Jones, 74, 64 Am. Dec. 596; *State v. Harman*, 78 N. C. 515; *Commonwealth v. Whittier*, 2 Brewst. 388; *State v. Chiles*, 58 S. C. 47, 36 S. E. 496. In *Hooks v. State*, 99 Ala. 168, 13 South. 767, the court in treating of the subject said, that "where one person detects another in the act of adultery with his wife, and immediately slays the adulterer or his wife, as matter of law the provocation is sufficient to reduce the killing to manslaughter. The law does not declare that anything less than sexual intercourse is a sufficient provocation, as a matter of law, to reduce the offense from murder to manslaughter. It may be that the detection of another, under circumstances of a peculiar nature, may provoke and engender passion to such an extent as to overcome reason, and if, under the influence of passion thus aroused, he immediately attack the offending party and slay him, before cooling time has intervened, not from malice or unlawful formed design, but from such passion thus provoked, the offense may be manslaughter. Whether the party acted under the influence of such a passion, and whether the provocation was sufficient, and whether there had been cooling time, are questions

of fact to be determined by the jury. The principle we announce is, that the law does not declare the provocation sufficient, unless the parties are detected in the act; but a jury may say whether the compromising position of the parties was sufficient to arouse passion in the husband to such a degree as to overthrow reason, just as a jury may say in some other cases whether the offense was the result of sudden and sufficient provocation to reduce the offense from murder to manslaughter." Although in an early North Carolina case (*State v. John*, 8 Ired. 330, 49 Am. Dec. 396) it was held that knowledge or belief of adulterous intercourse between the wife of the accused and the deceased will not mitigate the crime of killing from murder to manslaughter, and mere belief that the wife of the accused is in the very act of adultery with the deceased, at the time the accused breaks into the house of the deceased and kills him, does not mitigate the crime from murder to manslaughter, but in a later case (*State v. Harman*, 78 N. C. 518) the court said that "in the case before us the prisoner looked through a crack of his house and saw the deceased, whom he had before suspected, with his arms around his wife's neck, and saw enough to satisfy him, and ran around to the door and into his house, when the accused came at him with a knife, and he killed him. The situation was not the very act, but it was severely proximate, and fine distinctions need not be made. This is clearly not murder, but manslaughter." Again, in *State v. Chiles*, 58 S. C. 49, 36 S. E. 496, the court declared the law to be that a husband was guilty of manslaughter only who killed another man while holding the wife of the former in his guilty embrace, "but that the law would not hold a husband guiltless who went in search of the man to kill him, believing he was guilty of criminal intimacy with his wife": *State v. Chiles*, 58 S. C. 49, 36 S. E. 496. In *Mays v. State*, 88 Ga. 404, 14 S. E. 560, the court said that "the prisoner's statement shows that he arrived at home at night, and knocked on the front door several times. His wife finally told him to wait a minute. The husband then walked to the rear of the house, and, looking through the window, saw a man squatting in a rear room undressed. He called out to know who it was, and his wife said it was nobody; he undertook to light matches; his wife threw water on them and extinguished them. The deceased then started to run in a stooping position to the front door, and the husband shot him through the window and killed him. The deceased was seeking to escape the husband's vengeance, and the latter shot to prevent the escape. This shows that it was not necessary at that time to kill the deceased to prevent the adultery so as to make the homicide capable of standing upon the same footing of reason and justice as the instances of justifiable homicide enumerated in the code. But the provocation being intolerably great, it was enough to reduce the offense from murder to manslaughter": *Mays v. State*, 88 Ga. 404, 14 S. E. 560. No doubt exists that in order to mitigate

to manslaughter the crime of killing the wife or her paramour by the husband, the husband must discover them in the act of adultery, unless the provocation was so recent and strong that he could not be considered at the time master of his own understanding: *State v. Holme*, 54 Mo. 153. In *People v. Ryan*, 2 Wheel. C. C. 47-54, the court left it to the jury to say, under all of the circumstances of the case, whether the crime charged was murder or manslaughter, or justifiable homicide, and charged that "if the jury were of opinion that the prisoner committed the act while the deceased was in criminal intercourse with his wife, it would not be murder, nor even manslaughter, but would be justifiable homicide, *se defendendo*." This instruction, so far as it involves the question of justifiable homicide, was erroneous under the authorities cited above.

a. **Under Statutes.**—Adultery of the deceased with the wife of the slayer, who kills as soon as the fact of adultery is discovered, is one of the adequate causes expressly enumerated in the statute as sufficient to reduce a homicide from murder to manslaughter: *Tex. Pen. Code*, art. 597; and under this statute the provocation arising from such adultery is not required to arise at the time of the homicide, and the killing is manslaughter only if it occurs as soon as the fact of the illicit intercourse is discovered by the slayer: *Paulin v. State*, 21 *Tex. App.* 436, 1 *S. W.* 453. Under this statute making homicide by a husband justifiable when committed on one taken in the act of adultery with his wife before the parties have separated, it is sufficient if such parties are taken in such circumstances as reasonably indicate that they have just committed, or are about to commit, the adulterous act: *Price v. State*, 18 *Tex. App.* 474, 51 *Am. Rep.* 322.

II. When Murder.

As we have before shown, to reduce a homicide to manslaughter on the ground of illicit intercourse between the deceased and the wife of the accused, the detection must have been in the very act, or immediately preceding or following it, and the killing instant upon the detection. If, after reasonable time has elapsed for the passions to cool, or if, after merely learning of the outrage against his marital rights, the wronged individual immediately takes vengeance on the other by pursuing and killing him, his offense is murder, and not manslaughter: *Jones v. People*, 23 *Colo.* 276, 47 *Pac.* 275; *State v. Pratt*, 1 *Houst. Cr. Cas.* 249; *State v. Holme*, 54 *Mo.* 153; *State v. France*, 76 *Mo.* 681. Mere belief that the prisoner's wife is in the act of adultery with the deceased at the time that the prisoner breaks into the deceased's house and kills him does not mitigate the crime to manslaughter: *State v. John*, 8 *Ired.* 330, 49 *Am. Dec.* 396. So it is murder for one to kill another who has previously committed adultery with the wife of the former, and who the latter believes at the time of the killing is accompanying his wife for the purpose of committing adultery: *State v. Samuel*, 3 *Jones*, 74, 64 *Am. Dec.*

596. The mere fact that the prisoner knew of the adulterous intercourse between the deceased and his wife is no palliation of the killing after lapse of time sufficient for the passions to cool: *Sawyer v. State*, 35 Ind. 80. Or if a husband, after learning of the defilement of his wife, waits and deliberates, and then, not in a sudden heat of passion, goes a considerable distance with a pistol to the house of the deceased and there kills him, such provocation forms no justification to reduce the killing from murder to manslaughter: *People v. Halliday*, 5 Utah, 467, 17 Pac. 118. And if adulterous intercourse has taken place for a long series of years with the full knowledge of a son, who slays his mother's paramour in revenge, the adultery is no justification, and the killing is murder: *State v. Herrell*, 97 Mo. 105, 10 Am. St. Rep. 289, 10 S. W. 387. If a husband who suspects his wife of adultery follows her stealthily as she is going to a neighbor's, and having come up with her as she is talking with a man with whom she has previously been on terms of criminal intimacy, she runs away, and the husband kills such man, the former is guilty of murder: *State v. Avery*, 64 N. H. 608, wherein the court said: "According to the evidence in this case the prisoner was guilty of murder. Influenced by jealousy, he followed his wife stealthily to her place of assignation, and then slew the deceased with a deadly weapon. The killing was deliberate and prompted by a spirit of revenge. If the prisoner had come suddenly upon his wife and the deceased in the woods, and in the furor levis excited by the suspicious circumstances, had immediately slain the deceased, the killing would have been mitigated to manslaughter": *State v. Avery*, 64 N. C. 609. In *Bugg v. Commonwealth*, 18 Ky. Law Rep. 844, 38 S. W. 684, defendant testified that he had been informed that the deceased claimed to have been intimate with his wife, and when he spoke to the deceased about it, the latter claimed that such intimacy existed and displayed a pistol. Afterward, on hearing similar statements defendant determined to kill deceased, procured his pistol and hunted up his victim, and finding him, lost control of himself and killed him. It was held upon these facts that instructions could be given on no other theory than murder. Under the statute in Texas killing an adulterer is under most circumstances justifiable homicide, but in order to reduce the killing of the adulterer from murder to manslaughter, it must occur at the first meeting of the parties after the defendant has been informed of the adulterous intercourse and if there has been two meetings of the parties after the defendant has such information, the adultery is not adequate cause to reduce the killing to manslaughter, but can only be looked to in determining whether the homicide was committed upon implied or express malice: *Pickens v. State*, 31 Tex. Cr. Rep. 554, 21 S. W. 362; *Hardeastle v. State*, 36 Tex. Cr. Rep. 555, 38 S. W. 186.

III. Killing Adulteress.

The rules heretofore noted which govern in the case of killing an adulterer also govern in cases of the killing of an adulteress. Thus, if a man finds his wife in the act of adultery, and, provoked by the wrong done him, and moved by the passion naturally engendered, he immediately kills her, he is not guilty of murder but of manslaughter only. If, on the other hand, he does not kill her until there has been time for his passion to cool, and for reason to assert itself, or if he kills her immediately not moved thereto by heat of passion, but by prior malice, hatred, or desire for revenge for the wrong done him, or by any other motive, or upon any design whatever except such as is presently engendered by the paroxysm of rage into which he is thrown by the extreme provocation he is guilty of murder: *McNeill v. State*, 102 Ala. 121, 48 Am. St. Rep. 17, 15 South. 352; *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92, 21 South. 211; *Fry v. State*, 81 Ga. 645, 8 S. E. 308; *Sawyer v. State*, 35 Ind. 80. In order to mitigate to manslaughter the crime of killing his wife by the husband, he must discover her in the act of adultery, unless the provocation is so recent and strong that he could not be considered at the time master of his own understanding: *State v. Holme*, 54 Mo. 154. If the husband detects his wife in the act of adultery, and immediately slays her, the law does not entirely justify him, but holds the provocation sufficient to reduce the killing to manslaughter; and if he detects her not in the very act of adultery, but in a compromising position under suspicious circumstances and kills her, it is for the jury to determine whether the provocation was sufficient to reduce the grade of the crime to manslaughter, and whether he acted under the heat of sudden passion thereby excited: *Hooks v. State*, 99 Ala. 166, 13 South. 767. In *Shufin v. People*, 62 N. Y. 229, 20 Am. Rep. 483, it was held that if a husband, finding his wife in the act of adultery, strikes her with a deliberate intent to kill, it is murder, and that to reduce the crime to the grade of manslaughter the blow must have been given in the heat of passion and without intent to inflict death. This case, of course, is opposed to those cited above which hold that if a man discovers his wife in the very act of adultery, and immediately kills her in the heat of passion arising from the wrong done him, he is guilty of manslaughter only, regardless of his intent in striking her.

IV. Evidence that the person killed by the defendant had entered into a combination with a third person to induce the defendant's wife to elope, and that the facts of such combination, of late date, had come to the knowledge of the defendant is admissible: *Cheek v. State*, 35 Ind. 492. If the defendant is charged with killing his wife, and the evidence shows that at about the same time he killed a man, evidence is admissible to show that shortly before killing his wife the defendant was informed that she was criminally

intimate with the man killed: *Green v. Commonwealth*, 17 Ky. Law Rep. 943, 33 S. W. 100. Such evidence is admissible to show the state of mind of the defendant at the time of the killing. Thus evidence tending to show the commission of adultery by the person assaulted, with the prisoner's wife, within half an hour of the assault, that the accused saw them going into the woods together under circumstances calculated strongly to impress upon his mind the belief of an adulterous purpose; that he followed them to the woods and continued to follow them in hot pursuit, being informed on the way that they had committed adultery on the day before; that he followed the man into a saloon, and in a state of excitement there assaulted him, is admissible to show that the killing was done in consequence of passion excited by the provocation of the believed adultery, and in a state of mind which would have given to the homicide, had death ensued, the character of manslaughter only: *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781. The mental condition of the prisoner at the time of the killing arising from the fact of the recent discovery that his wife has been unfaithful to him, may be considered by the jury to determine the degree of passion which existed at the time of the killing: *Fisher v. People*, 23 Ill. 283. In determining the strength of the provocation on a trial for killing defendant's wife because of her adultery, the fact that he had permitted prostitutes to board in his house with her and to be visited by various men may be considered: *State v. Holme*, 54 Mo. 153. An offer to prove that the deceased, the wife of the defendant, had for a long time prior to the killing, been having adulterous intercourse with others, of which the defendant had long been cognizant, is incompetent in justification or palliation of the offense, because after a lapse of time sufficient for the passion to cool, and for reason to assume its sway, the killing is as criminal and indefensible as if the deceased had never been guilty of adultery: *Sawyer v. State*, 35 Ind. 80. Evidence that the deceased, on being remonstrated with by the witness for visiting the defendant's wife, replied that he should go there as much as he pleased, and that he was not afraid of the defendant, is not admissible if such statement is not communicated to the accused, and in such case the testimony of the wife that the deceased had coerced her into an act of adultery, and that she told her husband the night before the killing that the rumors heard by him were true, is inadmissible, in the absence of proof that he knew of such act of adultery, or of what such rumors consisted: *Combs v. State*, 75 Ind. 215. The testimony of the wife that she had confessed adultery with the deceased, and that her confession was followed by great excitement on the part of the defendant, is inadmissible, if it is shown that her statement, and not the truth thereof, was the exciting cause of the defendant's act: *People v. Hurtado*, 63 Cal. 288. Evidence of the declaration of the deceased wife that she had

been guilty of adultery has been held irrelevant when offered in defense of the husband accused of her murder: *State v. Rash*, 12 Ind. 382, 55 Am. Dec. 420. If it appears that at the time of the killing defendant was living apart from his wife, and he testifies that he killed her while in a frenzy arising from her confession of adultery, it may be shown that while living apart from his wife he lived in adultery with other women, as tending to show the improbability of his being frenzied by his wife's confession: *Garlitz v. State*, 71 Md. 293, 18 Atl. 39. Evidence of declarations by the deceased that he had maintained illicit relations with defendant's former wife, which was the cause of the killing, may be rebutted by the evidence of such wife that she had never maintained such relations with the deceased, and that the defendant had never charged her therewith, nor suspected her thereof: *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

KELLY v. NEW HAVEN STEAMBOAT COMPANY.

[74 Conn. 343, 50 Atl. 871.]

A MASTER is not Liable to His Servant for injuries caused solely by the negligent act of a competent fellow-servant. (p. 221.)

MASTER AND SERVANT—Injury to One Servant from the Neglect of Another.—A master is not liable to one servant for an injury due to the negligence of another, unless the duty violated by the offending fellow-servant was one resting upon the master. If the duty rests upon the master, he, as a general rule, is liable to the injured servant for the negligence of the offending servant; otherwise he is not. (p. 222.)

MASTER AND SERVANT—Appliances, Negligence in the Use of.—Where a master has furnished suitable appliances for his servants to work with, he is no answerable to one of them who is injured by the failure to use such appliances, such failure being due solely to the negligence of a fellow-servant. (p. 222.)

Action to recover of the defendant corporation compensation for injuries to the defendant's intestate while in its employ, from which his death resulted. The defendant was a steamboat corporation, and the deceased was in its employ as a deckhand. From the failure to use a beam of wood, commonly called a fender, to prevent a hawser from slipping, it slipped and caused the injuries for which the action was brought. It was the duty of the mate to have directed the deckhands to have used this fender, and its use would have prevented the accident. The defendant claimed that the injury to the decedent was due to the negligence of his fellow-servant, but the

trial court ruled otherwise and rendered judgment for the plaintiff for four thousand dollars, and the defendant appealed.

Edward H. Rogers, for the appellant.

James H. Webb and Arnon A. Alling, for the appellee.

345 TORRANCE, C. J. The trial court has found that, legally speaking, the sole cause of the accident to Kelly was the negligent failure to use the fender; and one of the important questions in the case is whether the defendant was responsible to Kelly for that failure. It was so responsible, if in law the negligence of the mate was the negligence of Kelly's master, while it was not, if such negligence was that of Kelly's fellow-servant.

The common-law rule that a master is not liable to his servant for injuries caused to the latter solely by the negligence of a competent fellow-servant, is recognized as the settled law of this state: *Burke v. Norwich etc. R. R. Co.*, 34 Conn. 474; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 47 Am. Rep. 653; *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Zeigler v. Danbury etc. R. R. Co.*, 52 Conn. 543; *Griswold v. New York etc. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Nolan v. New York etc. R. Co.*, 70 Conn. 159, 39 Atl. 115. The rule seems plain enough in itself, but in applying it no universal, fixed and reliable principle, or test, for determining **346** who are fellow-servants within its meaning, has been agreed upon. Different courts have adopted and applied different tests, and the natural result is conflicting decisions in the different jurisdictions, and a confused and unsettled state of the law of master and servant.

Speaking generally, two rules, applied as tests in questions of this kind, have obtained a wide acceptance. Under one, the test is whether the duty violated by the offending servant was one resting upon the master, or solely upon the offending servant; while under the other, the test is whether the offending servant, in what he did or omitted to do, was or was not *pro hac vice* the master. Under the first rule the test is mainly the nature and character of the duty violated by the offending servant. If it was a duty resting upon the master, the master, as a general rule, is liable to the injured servant for the negligence of the offending servant; if it was not such a duty he is not. Under this rule the rank or grade of the offending servant in the master's business, or the department of it in which

he is employed, as compared with that of the injured servant, is not of primary importance in determining the master's liability.

Under the second rule, the test is mainly the relation of the offending servant to the master and to the injured servant. If in what he does he acts for and represents the master, and therefore *pro hac vice* is the master, then his negligence is the master's negligence. Under this rule the rank or grade of the offending servant in his master's business and the department in which he works, is regarded as of primary importance in determining the master's liability.

The first of these tests—the nature and character of the duty violated—is the one adopted in this state. This is the test applied in *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 17 Am. Rep. 653, in *McElligott v. Randolph*, 61 Conn. 157, 20 Am. Rep. 181, 22 Atl. 1094, and in *Sullivan v. New York etc. R. R. Co.*, 62 Conn. 209, 51 Atl. 711; it is also the one, if not in form, in fact at least, applied in *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590, *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 27 Atl. 235, and in *Sprague v. New York etc. R. R. Co.*, 68 Conn. 345, 36 Atl. 791, for in each of these cases the duty violated ³⁴⁷ by the offending servant was held to be a duty resting upon the master.

In the case at bar the trial court has found that the master violated its duty to furnish Kelly a reasonably safe place to work, and reasonably safe appliances; but this conclusion is based entirely upon the fact that the fender was not used. With that in use, it is found that the place and appliances were reasonably safe. The controlling question in the case is whether it was the duty of the defendant to see that the fender was used. We think it was not. It had furnished a sufficient fender, and a place in which it could be used, and it kept the fender in a proper and convenient place at all times ready for use. In doing this it had performed its full duty in this respect. It was not obliged to be there every time the boat was docked, to use the fender, or to see to it that it was used. It was the duty of the defendant to furnish the appliances; it was the duty of the servants to use them when necessary. When the owner of a vessel furnishes proper guardrails, gangplanks and hatchway covers for the use of the crew, we know of no case that has gone so far as to hold that he is liable to one of the crew, for the negligence

of a fellow-servant, in leaving the guardrail down, the hatchway uncovered, or the gangplank insecurely fastened. Such negligences are incidental to the use by the crew of the appliances furnished by the master; and the only way the master is required to guard against them is to appoint a sufficient number of competent servants. Our conclusion is that the court below erred in holding that the defendant was liable for the negligence of the mate upon the facts in this case.

The following are a few of the many cases outside of our own reports which might be cited in favor of the conclusion reached in this case: *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421, 37 N. E. 450; *Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369, 40 N. E. 507; *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, 38 Atl. 677; *Sofield v. Guggenheim Smelting Co.*, 64 N. J. L. 605, 46 Atl. 711.

There is error, the judgment is set aside, and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

A Master is not Liable to his servant for injuries caused by the negligence of a fellow-servant: *Baltimore etc. Ry. Co. v. Read*, 158 Ind. 25, post, p. 293, 62 N. E. 488; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Brewster v. Chicago etc. Ry. Co.*, 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841, 40 S. E. 368. But if he intrusts the performance of a duty due to his servant to another servant, the latter occupies his place and he becomes liable for such servant's negligence in respect to such performance: *Chicago etc. R. R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, 62 Am. St. Rep. 784; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584-640, on who is a vice-principal. If a servant is injured by a defective tool, the fact that a fellow-servant using it with him knew its condition does not relieve the master from liability: *Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 89 Am. St. Rep. 461, 86 N. W. 520.

The Captain of a Vessel and the Seamen are fellow-servants: *Gabrielson v. Waydell*, 135 N. Y. 1, 31 Am. St. Rep. 793, 31 N. E. 969. So are the mate and seamen, and the latter cannot recover from the owners for injuries received while using an implement which he is directed to use by the mate, who was guilty of negligence in constructing it and in ordering the seamen to use it: *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421, 37 N. E. 450.

COUGHLIN v. McELROY.

[74 Conn. 397, 50 Atl. 1025.]

PAYMENT OF FEES by a Municipality to an Officer—What Amounts to.—If a de facto tax collector, before paying over his collections to the municipality deducts his fees or commissions, they must be regarded as having been paid to him by the municipality. (p. 226.)

OFFICER DE FACTO—Payment to—Whether Relieves Municipality from Liability to Officer de Jure.—If a municipal corporation pays to a de facto tax collector his fees or commissions on collections made by him, it is thereby protected from liability to one subsequently adjudged to have been tax collector de jure. (p. 227.)

DEMAND FOR FEES—When not Void Because for Too Much. If a tax collector makes demand on a municipal corporation for his fees for an entire year, when he is entitled to fees for that part of the year only since he has taken possession of the office, his demand is notwithstanding good for the portion to which he is entitled. (p. 227.)

AN OFFICER DE JURE is Entitled to Recover of an Officer de Facto fees paid to the latter while in possession of the office to which it has been adjudged his title was not good. (p. 228.)

Action by Coughlin against McElroy and the city of Bridgeport to recover fees of the office of tax collector of that city for the year commencing April 10, 1899. McElroy was the incumbent of the office prior to that date, and was declared to be re-elected thereto, and he discharged the duties of his office until August 8th of that year, when he surrendered it to the plaintiff as the result of a decision in favor of the latter by the supreme court of errors.

Until he surrendered the office, McElroy retained the fees or commissions for the collection of taxes, amounting to nearly five thousand dollars, and before the end of the year and after the surrender of the office to the plaintiff, additional sums became due from the city for further collections. The defendant McElroy did nearly all the work for the office for the year in question, and neither he nor the municipality had any reason to believe his re-election to be in doubt. A demurrer to the plaintiff's complaint was overruled, and the cause reserved for the advice of the supreme court of errors.

Daniel Davenport and Henry E. Shannon, for the plaintiff.

John C. Chamberlain and Alfred B. Beers, for the defendants.

⁴⁰⁰ TORRANCE, C. J. In the case of *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854, this court held, in effect, that the plaintiff in the present case had been elected as tax collector of the city of Bridgeport for the term beginning April 10, 1899, and judgment in his favor to that effect was rendered in the superior court. Pending that contest, McElroy was in possession of the office and performed the duties thereof from April 10, 1899, to August 8th of the same year. During this period, upon the facts found, it is clear that the plaintiff was the ⁴⁰¹ tax collector *de jure*, and the defendant McElroy was the tax collector *de facto*. While holding said office as *de facto* collector, McElroy received and still retains certain sums of money, which the plaintiff seeks to recover from the city, or from McElroy, as the fees and emoluments of said office belonging to him as collector *de jure*.

The record presents for consideration two main questions: 1. Is the *de jure* officer, upon the facts found, entitled to recover from the city the sums so received and retained by the *de facto* officer? 2. Is he entitled to recover them from the *de facto* officer?

Although questions of this kind have frequently been considered and passed upon elsewhere, they are, so far as we know, questions of first impression in this state; and as we have no statute upon the subject, they are to be decided by the rules and principles of the common law applicable thereto. The decision of the first question involves the decision of a subordinate one—namely, whether upon the facts found the city can be considered as having legally paid to McElroy the fees retained by him as collector *de facto*.

The plaintiff claims that under the city charter and ordinances it is the duty of the tax collector to pay over to the city the full amount collected, without deduction, and to present his claim for fees to the proper authorities; and that McElroy having failed to comply with the provisions of the charter and ordinances in this respect, the money retained by him for fees cannot be regarded as having been paid to him by the city. Assuming, without deciding, that the plaintiff is right in his construction of the charter and ordinances of the city in regard to this matter, still we think that upon the facts found, and for the purposes of this case, the city must be regarded as having paid to McElroy the sums by him retained.

The sums retained from time to time were the precise sums fixed by law as the fees of the collector, and for aught that appears of record they were due at the very time they were so retained, upon collections then turned over to the city; they were retained with the full consent and allowance of the ⁴⁰² city, upon the understanding between it and McElroy that they were payments; and they were so retained and allowed in the utmost good faith on the part of both, and in the full belief, on what then appeared to be reasonable grounds, that the payee was *de jure*, as he was *de facto*, the incumbent of said office. Payments of this kind to *de jure* collectors had been made in this way by the city for twenty years, and with full knowledge of the facts no one had questioned their validity. Fees retained by *de jure* tax collectors, under circumstances quite similar to those in the case at bar, have by our courts, in favor of sureties and taxing communities, been treated and regarded as payments; and we see no good reason in the present case why the fees retained by a *de facto* officer should not be regarded, in favor of the city, as having been paid to him by it. We think the evidence objected to was admissible to show such a payment, and that it was made in good faith; and that the city, as against the plaintiff, must be regarded as having paid to the *de facto* collector, in good faith and before he was ousted, the sums retained by him.

This being so, the question is whether the city, having in good faith paid to the *de facto* officer, before judgment of ouster, the fees of the office, is liable to the *de jure* officer for such fees.

Upon this question the decisions of the courts of this country are in direct conflict. Quite a number of courts of high authority, among which may be mentioned those of California, Maine, Tennessee, Wyoming, and Pennsylvania, hold that such a payment does not protect the community against the claims of the *de jure* officer: *People v. Smyth*, 28 Cal. 21; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Rasmussen v. Carbon County*, 8 Wyo. 277, 56 Pac. 1098; *Philadelphia v. Rink* (Pa.), 2 Atl. 505. On the other hand, the courts of a majority of the states that have had occasion to pass upon this question hold that such a payment does protect the community. Among the courts holding this doctrine may be mentioned those of the states of Michigan, New York, Missouri, Ohio, Kansas, Nebraska,

and New Hampshire: Wayne ⁴⁰³ County v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Dolan v. Mayor, 68 N. Y. 274, 23 Am. Rep. 168; McVeany v. Mayor etc., 80 N. Y. 185, 36 Am. Rep. 600; State v. Clark, 52 Mo. 508; Westberg v. Kansas, 64 Mo. 493; Steubenville v. Culp, 38 Ohio St. 18, 23, 43 Am. Rep. 417; Commissioners of Saline County v. Anderson, 20 Kan. 298, 27 Am. Rep. 171; State v. Milne, 36 Neb. 301, 38 Am. St. Rep. 724, 54 N. W. 521; Shannon v. Portsmouth, 54 N. H. 183.

It seems to us that the rule laid down in this last class of cases is in reason the better one. It rests upon the familiar and reasonable rule that persons having the right to do business with a *de facto* officer like the one in question have the right to regard him as a valid officer, and the right to make payments to him without the risk of having to pay a second time. This is the rule that protected the taxpayers in making payments to McElroy, and there appears to be no good reason why it should not be applied to payments made by the city to him in good faith and before judgment of ouster. Our conclusion is that the city is not liable to the plaintiff for the fees paid by it to the *de facto* collector.

With regard to the plaintiff's fees due for collections made by him since he took possession of the office, he is of course entitled to them. It is admitted by the pleadings that he duly presented his claim and demanded payment from the city. It is true that the claim so presented was for the fees for the entire year; but the greater includes the less, and we think his claim and demand included the fees earned by and due to him since he took possession.

The next question is whether the plaintiff is entitled to recover from the *de facto* officer the fees paid to such officer by the city; and the answer to this depends upon the answer to the further question, whether this can be done at common law and without the aid of a statute.

The courts of this country that have had occasion to pass upon this last question have almost unanimously answered it in the affirmative. That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the *de facto* officer, though he performs the duties of the office, has no legal right to the emoluments thereof, are propositions ⁴⁰⁴ so generally held by the courts as to make the citation of authorities in support of them almost superfluous.

Nearly all, if not all, cases hereinbefore cited upon both views as to the liability of the city, hold that the *de facto* officer, for fees and emoluments of the office received by him, is liable at common law to the officer *de jure*. So far as we are aware the only well-considered case taking a contrary view of the law is that of *Stuhr v. Curran*, 44 N. J. L. 181, 186, 43 Am. Rep. 353, and that was decided by a divided court standing seven to five. We think the able dissenting opinion of Chief Justice Beasley in that case shows conclusively that at common law, in a case like the present, the *de jure* officer is entitled to recover from the *de facto* officer. Another well-considered case directly in point in favor of this view is that of *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983. As before intimated, this court has not heretofore had occasion to decide a question similar to the one now under consideration, but in two cases at least the judges who wrote the opinion of the court have expressed views in harmony with what we hold to be the law. Thus, Chief Justice Seymour, in *Samis v. King*, 40 Conn. 298, 310, said: "The right to the salary of an office (as such, independent of actual and valuable services rendered) must on principle depend upon the legal possession of the office." It is a grave question whether a merely *de facto* officer, even when he actually performs the whole duties of the office, can enforce the payment of the salary. The authorities seem to be that he cannot. Chief Justice Butler, in *State v. Carroll*, 38 Conn. 449, 471, 9 Am. Rep. 409, says that a *de facto* officer "cannot collect his fees, or claim any rights incident to his office, without showing himself to be an officer *de jure*."

That this law will at times operate harshly against the *de facto* officer, and that it will so operate in the case at bar, must be conceded; and the seeming injustice of it is forcibly stated in the majority opinion of the New Jersey court before cited; but the courts must enforce the law as it is and not the law as they think it ought to be. If the law requires to be changed, that must be left to the legislature.

405 Our conclusion is that upon the facts found in this case the plaintiff is entitled to recover from McElroy the fees retained by the latter as an officer *de facto*.

The superior court is advised (1) to render judgment in favor of the plaintiff against the city of Bridgeport for the sum of eight hundred and eighty-seven dollars and fifty cents with interest from the date of demand, and (2) to render

judgment in favor of the plaintiff against McElroy for the sum of four thousand seven hundred and seventy-five dollars and two cents, with interest from the date of demand.

Costs in this court will be taxed in favor of the plaintiff.

In this opinion the other judges concurred.

Payment to a de Facto Officer of the salary appertaining to the office releases the municipality, according to the weight of authority, from any further liability to pay it. There are cases, however, which decide that such payment in no way impairs the right of the officer de jure to recover the salary from the municipality: See *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1; *State v. Milne*, 36 Neb. 201, 38 Am. St. Rep. 724, 54 N. W. 521; *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280, and note. That the officer de facto is answerable for such salary to the officer de jure, see *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228, 29 N. E. 689.

BULKLEY v. SEYMOUR.

[74 Conn. 459, 51 Atl. 125.]

A DEVISE of Land Which is Subject to a Mortgage Made by the Testator imports an intention that the debt be satisfied out of the general personal assets. (p. 230.)

Suit to construe the will of Nancy D. Rhodes, by which she devised two certain parcels of real property which, though the will did not mention it, were then subject to mortgages made by the testatrix to secure her debts, and the only question presented for consideration was whether such debts should be paid out of the personal assets of the decedent.

Charles M. Joslyn, for the plaintiff.

Harrison B. Freeman, Jr., George J. Stoner, John A. Stoughton, and Joseph L. Barbour, for the defendants.

461 **TORRANCE, C. J.** In construing a will the object of the court is to ascertain the actual intention of the testator as expressed, explicitly or impliedly, in and by the words of the will. In the case at bar the question is whether the testatrix has, in the way above indicated, manifested an intention that the devisees should take the land in question burdened with the mortgage debt. The devises here in question

are simply conveyances of the land described, unburdened by any mortgage indebtedness or anything else; and nowhere in the will is there any indication of an intent to limit the gift to the mere value of the equity of redemption. The expressed intent, rather, is that the devisees shall have the full benefit of the described land. Here, then, we have the case of a simple devise of land, which, at the time it takes effect, is subject to a mortgage to secure a debt of the testatrix. The rule in such cases is that the land passes to the ⁴⁶² devisees exonerated from the mortgage debt, unless a contrary intention appears in the will; in other words, such a devise in such a will "prima facie imports an intention that such debt shall be satisfied out of the general personal assets": *Turner v. Laird*, 68 Conn. 198, 200, 35 Atl. 1124; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Hewes v. Dehon*, 3 Gray, 205; *Gould v. Winthrop*, 5 R. I. 319. The same rule has been applied to a specific devise of personalty pledged for a debt: *Johnson v. Goss*, 128 Mass. 433.

The case at bar comes within this rule. The testatrix has devised land specifically, and it is subject to a mortgage created by her to secure her own debt, and she has made no provision whatever in her will for the payment of the debt, nor does she therein indicate any intention that it is to be paid by the devisee. These are the material facts in the case, and there is nothing in the other facts found that affects or changes them, or makes the above rule inapplicable to them. Applying that rule to the case, the will in question must be held to manifest an intent that the mortgage indebtedness, resting upon the land specifically devised, should be paid by the executor as a debt of the testatrix out of the personal assets of the estate.

The superior court is advised to render judgment in accordance with the views herein expressed.

No costs in this court will be taxed for or against any of the parties.

In this opinion the other judges concurred.

* *Between the Real and Personal Representatives*, the general rule is that the personalty is the primary fund for the payment of debts. This rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased, but it extends only to encumbrances created by the deceased himself: *Hunt, Petitioner*, 19 R. I. 139, 61 Am. St. Rep. 743, 32 Atl. 204.

COLBURN'S APPEAL.

[74 Conn. 463, 51 Atl. 139.]

CONFLICT OF LAWS.—Whether an assignment of policies of life insurance from a husband to his wife passes the whole interest in it depends on the law of the state of their domicile, and if this is Massachusetts, the effect is the same as if the assignment were made to her by a third person, to whom the husband had previously assigned the policy. (p. 233.)

LIFE INSURANCE—Assignment of Policy.—The Acceptance of an assignment of a policy of life insurance is sufficiently implied from the failure of the assignee to dissent. (p. 233.)

LIFE INSURANCE—Assignment of Policy—Presumption of Consideration.—Where an assignment of a policy of life insurance purports to be for a valuable consideration, it will be presumed that a sufficient consideration existed. (p. 233.)

INSURANCE, LIFE.—An assignment of a policy of life insurance need not be in writing, nor need the policy be delivered. (p. 234.)

ASSIGNMENT, When Sufficient.—As to the debtor, the only important thing in respect to a transfer of a chose in action is that he should have notice of the assignment. (p. 234.)

ASSIGNMENT—Delivery of to the Assignee—When not Necessary.—As to an assignee of a debt, if he has notice from the assignor that the assignment has been made, assents to it, and if the assignment be at the same time in the hands of the debtor, there is no reason for denying the assignee's beneficial title. (p. 234.)

ASSIGNMENT—Intention of the Assignor—When Cannot Control.—If an assignment of a policy of life insurance is made by a husband to his wife, the only intention on his part which is to be regarded is that expressed in the assignment, and therefore if his wife dies, his intention cannot be proved to prevent her collateral relatives from taking an interest. (p. 234.)

Objection to an administrator's account on the ground that he did not include as an asset of the estate of Nellie A. Bates, a policy of insurance on the life of Gustavus D. Bates, issued by the Mutual Life Insurance Company of New York in 1868, payable to the executors, administrators, or assigns of the insured. It provided that if assigned, written notice should be given the insured. After it issued Bates married Nellie A. Bates, and in 1870 executed at Boston, where both were then domiciled, a written assignment in duplicate of his interest in the policy to his wife, which assignment purported to be in consideration of one dollar and for other valuable considerations. One of the assignments was at once sent to the insurer at its main office in New York, to be perfected as prescribed by its rules. It was received and the proper

entries made upon the books, indicating that the policy was payable to Mrs. Bates. The original policy and a duplicate of the assignment remained in the possession of Mr. Bates, but his wife was informed of the assignment some time after it was executed. She having died intestate, her administrator refused to inventory the policy, and for this reason his account was disallowed by the probate court. On appeal from that court its order was reversed by the superior court of Windham county, and the heirs at law of the decedent thereupon appealed to the court of errors.

Frank T. Brown, for the appellants.

Charles E. Searles, for the appellee.

⁴⁶⁵ BALDWIN, J. The assignment of the policy, followed by notice to the company, and the consequent entry upon its books, made it, so far as the company was concerned, payable to Mrs. Bates, or in case of her death to her estate: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 28, 52 Am. Rep. 245. This policy was a contract made in New York and to be performed in New York, and the assignment in her favor was unquestionably valid under the laws of New York, where it was delivered to the company. Whether, however, the whole interest in the policy was transferred, as between her and her husband, depended on the laws of the state of their domicile, Massachusetts, regulating the marriage relation, and also on the effect of the want of delivery to her of either the policy or the assignment: *Freeman's Appeal*, 68 Conn. 533, 538, 57 Am. St. Rep. 112, 37 Atl. 420.

In 1870 the common-law disability of a wife to take under a direct conveyance from her husband was in full force in Massachusetts, except so far as affected by certain statutes. As to some of them, it was provided that they should not "authorize the husband to convey or give property to his wife": *Mass. Gen. Stats., Rev. of 1860, p. 539, sec. 10*. But by another statute, not affected by that proviso, passed in 1864, it was enacted that "a policy of insurance on the ⁴⁶⁶ life of any person, duly assigned, transferred, or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer be made by her husband or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or of the person affecting or transferring the same

or his creditors": 1 Supp. Mass. Gen. Stats., p. 270, c. 197. This put the assignment in question on the same ground as if it had been made by a third person to whom Mr. Bates had previously assigned it; and removes any difficulty which otherwise might have attended a transfer from him directly to Mrs. Bates: *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720. The term "duly assigned," as thus used by the legislature in connection with a transfer by a husband to his wife, necessarily imports that such a transfer can be duly—that is, legally—made.

The policy, having been fully paid up, was the evidence of an absolute debt. It was for a sum certain, payable unconditionally upon an event which would certainly occur. It contemplates and provides for the contingency of an assignment. In that case, to perfect the assignment, written notice to the insurer was required. Such notice having been given, and the proper entry made in the company's books, not only was there a change in the party to whom the performance of the obligation was legally due, but by the information of the assignment subsequently given by the assignor to the assignee and her acceptance of the benefit of it, the change of ownership became complete. This acceptance was sufficiently implied from her failure to dissent: *De Forest v. Bacon*, 2 Conn. 633, 637. *Qui tacet consentire videtur*.

Had there been no consideration for the assignment, it may be that it could not have been supported as a gift of the policy to her, for want of a sufficient delivery. A gift can be constituted only by an executed contract—that is, a contract executed by delivery of possession and an acceptance by or for the donee. "The intention to give must be accompanied by a delivery, and the delivery must be made with an intention ⁴⁶⁷ to give": *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192; *Spooner v. Hillish*, 92 Va. 333, 341, 23 S. E. 751; *Main's Appeal*, 73 Conn. 638, 642, 48 Atl. 965.

But the assignment in question recites that it was made for a valuable consideration. It is absolute in its terms. It was effectual, as has been already stated, to transfer the legal right of action on the policy. It is not found to have been in fact without consideration; and in the absence of such a finding it must be taken to be what it purports to be.

The law as to the delivery of a chose in action necessarily differs from that affecting the delivery of tangible property. A book-debt may be assigned orally, and if, upon oral notice

to the debtor, he promises the assignee to pay it to him, a novation is effected: *Risley v. Phenix Bank*, 83 N. Y. 318, 328, 38 Am. Rep. 421. If the subject of transfer be a debt evidenced by a written obligation, a written assignment is not absolutely necessary. Delivery of the obligation may, under some circumstances, be sufficient. But a delivery of the obligation itself is not indispensable. Where an obligation for the payment of money is absolute, although the time of payment has not arrived, the fund may be assigned, notwithstanding the document creating or evidencing the duty to pay it be retained in the hands of the assignor: *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268; *Reid v. McCrum*, 91 N. Y. 412, 419; *Bliss on Life Insurance*, sec. 330.

Nor is it indispensable that a written assignment should be delivered either to the debtor or to the assignee. As to the debtor, the only important thing, in respect to the transfer of the equitable ownership, is that he should have notice that an assignment has been made: *Kingman v. Perkins*, 105 Mass. 111. As to the assignee, if he, on notice from the assignor that an assignment has been made, assents to it, and if, as in the case at bar, the assignment be at the time in the hands of the debtor, we see no reason for denying his beneficial title. When an instrument is executed in duplicate, each is an original, and if one be delivered, its effect is not lessened because the other has not been. *Mrs. Bates*, being a purchaser for value, took, therefore, not simply a right of ⁴⁶⁸ action, but, as she never had any children, a right of action for her own sole benefit.

From this point of view, the fact that *Mr. Bates* did not intend to assign any interest which could inure to the benefit of his wife's collateral relations is immaterial. The only intention on his part which is to be regarded is that expressed in the written assignment.

Even if it were to be assumed that he could have reclaimed the benefit of the policy, or fully reduced it to his own possession again, during her life, as a chose in action accruing to her during coverture, he made no such attempt: *Allen v. Wilkins*, 3 Allen, 321; *Towle v. Towle*, 114 Mass. 167, 168.

A totally different question is presented under a contract of membership in a benefit society, when the death benefit is made payable to such beneficiaries as the person holding the membership certificate may appoint. An appointment so made is revocable, because it is a mere unilateral act, not

amounting to a transfer, and creating no vested interest: Masonic Mut. Ben. Assn. v. Tolles, 70 Conn. 537, 544, 40 Atl. 448; Hellenberg v. District No. 1, 94 N. Y. 580.

It follows that the policy was an asset of the estate of Mrs. Bates, and should have been included in the administration account.

There is error, the judgment of the superior court is reversed, and the decree of the court of probate affirmed.

In this opinion the other judges concurred.

The Assignment of Life Insurance policies is exhaustively considered in the recent note to Chamberlain v. Butler, 87 Am. St. Rep. 484-519.

Conflict of Laws as affecting transactions with married women is considered in the monographic note to Locke v. McPherson, 85 Am. St. Rep. 552-578.

THOMPSON v. BETTS.

[74 Conn. 576, 51 Atl. 564.]

WILLS, CONSTRUCTION OF.—Extrinsic Evidence is not Admissible to aid the construction of a will, where, from its language alone, when applied to the facts and circumstances to which it relates, the meaning of the testator is clear. (p. 237.)

WILLS, CONSTRUCTION OF.—Extrinsic Evidence, When Admissible.—For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to be interested under the will and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. (p. 237.)

WILLS—Legacy, Repetition of.—Where a will twice names the same legatee and the amount of the legacy, the legatee is entitled prima facie to but one legacy, nor does proof that the legatee was a favorite sister of the testator render this rule inapplicable. (p. 238.)

DOWER—Legacy, When not Presumed to be in Lieu of.—Before it can be presumed that a legacy was given in lieu of dower, it must appear by the will, either expressly or by implication, that such was the testator's intent, and such intent is not shown by implication where there is no provision of the will clearly inconsistent with the assertion of the right of dower. (p. 239.)

Suit to determine the construction of the will of Charles E. Thompson, deceased. The clauses under consideration are as follows: "1. I give and bequeath absolutely to my wife, Anna M. Thompson, of said town of New Haven, the sum of thirty thousand dollars. 2. I give and bequeath absolutely as follows to the following named persons, viz.: To Ella L. Sheldon of Middletown, Connecticut, three thousand dollars; to my sister in law, Anna Thompson, three thousand dollars; to my nephew, Augustus S. Thompson, seven thousand dollars; to Mrs. Jane Merle, four thousand dollars; to Emily Leek, three thousand dollars, all of said town and county of New Haven; and to the Home of the Friendless, a corporation chartered by the legislature of this state, and located in said town of New Haven, the sum of five thousand dollars."

By other clauses of the will, legacies amounting to twelve thousand five hundred dollars were given to various persons. Clauses 7 and 8 were as follows: "7. Should my estate be, at the time of my death insufficient to pay the above bequests in full, then I direct that said devisees above named shall share the loss pro rata, i. e., in proportion to the amounts severally bequeathed to said devisees, except my wife, Anna Thompson, who is to receive hers in full. 8. All the rest, residue, and remainder of my estate, both personal and real, in possession, remainder, or reversion, I give and devise to my heirs at law, to them and their heirs."

The will was executed in January, 1897, and the testator died in July, 1900. When his will was made, he owned no real property, but he subsequently acquired some by the foreclosure of a mortgage. At his death, his real property was worth twenty-four thousand dollars and his personal about eighty-eight thousand dollars. He married some twenty years prior to the execution of the will, and his wife survived him. The debts, legacies, and charges against the estate exceeded the value of his personal property, and the sale of some real estate was thereby made necessary.

The questions to be decided were whether the bequest to the widow was in lieu of dower, and whether Emily L. Betts was entitled to two legacies of three thousand dollars each, or one only, and both questions were by the superior court of New Haven county reserved for consideration and advice of the supreme court of errors.

Burton Mansfield, for Anna M. Thompson.

Frank M. Canfield, for Emily L. Betts.

William B. Stoddard, for Susan A. Leach et al.

Rufus S. Pickett, for Augusta A. Rice.

E. P. Arvine, for Marietta Leek.

578 TORRANCE, C. J. One of the questions reserved relates to the use, or admissibility, as aids in the process of construing the will in question, of certain of the evidential facts agreed upon, and that question will be first considered.

579 Certain of the parties in this case object to the use or admissibility, for the above purpose, of certain of the facts stated in the record. To which of these facts the objection is taken the record does not disclose; but in the briefs and in the oral argument it is and was taken only to two of them, namely: 1. The fact that Emily Leek Betts was a favorite sister of the testator; 2. The fact that the widow of the testator, before and at the date of the will and continuously since, was and is the owner in her own right of real estate worth twelve thousand dollars; and we will therefore assume that these are the only facts to which the objection relates.

Speaking generally, in aid of the process of construction and interpretation, resort will be had, first, to the evidence furnished by the will itself, and if that proves to be insufficient, resort may be had to any appropriate extrinsic evidence. If, taking the language of the will alone, when applied to the facts and circumstances to which it relates, the meaning of the testator is clear, extrinsic evidence is unnecessary and therefore inadmissible. "Why seek by parol to explain that which needs no explanation?" *Hall v. Rand*, 8 Conn. 561, 574; *Post v. Jackson*, 70 Conn. 283, 39 Atl. 151. On the other hand, if in the process of construction it becomes necessary to resort to evidence of the facts and circumstances under which the will was made, the general rule is that expressed in Wigram's fifth proposition, namely: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has

given by his will": Wigram on Wills, prop. 5. In short, the court may, by evidence of extrinsic facts other than direct evidence of the intention of the testator, put itself as near as may be "in the condition of the testator in respect to his property, and the situation ⁵⁸⁰ of his family," for the purpose of rightly understanding the meaning of the words of his will: Bond's Appeal, 31 Conn. 183, 190. Whether the facts objected to fall within the class of facts covered by this rule, and whether extrinsic evidence of the kind furnished by them is necessary in this case, are questions about which courts might differ; but they are also questions which, in the view we take of this case, it is unnecessary to decide: for they are not decisive of the main questions presented upon the record. In the discussion of those questions, then, we will assume, without deciding, that the facts objected to are admissible in aid of the process of construction.

The language of the second clause of the will, so far as it relates to Mrs. Emily Leek Betts, is this: "I give and bequeath absolutely as follows: . . . To my sister, Emily Leek, three thousand dollars. . . . To Emily Leek, three thousand dollars." Here we have, in the forepart of the clause, a legacy of a specified amount to Mrs. Betts, and a little further on in the same clause a legacy of a like amount to the same person, repeated substantially *totidem verbis*, and nothing more. In such a case, the legatee is *prima facie* entitled to one legacy only, the presumption being that one of the bequests is but a repetition of the same gift; "and they will not be construed as cumulative, unless there be something in the language, or in the attending circumstances, proper to come in aid of construction, showing a different intent": 2 Redfield on Wills, 178; 1 Swift's Digest, 456; Hawkins on Wills, 303. This common sense inference or presumption that one of the gifts, in a case like the present, is but a repetition of the other and not a second gift, may now be said to have acquired the force of a rule of construction, and it is applicable in this case; for there is nothing in the will, nor in the facts agreed upon, including the fact that Mrs. Betts was the favorite sister of the testator, that makes the rule inapplicable. Under this rule, then, Mrs. Betts is only entitled to one legacy of three thousand dollars.

The remaining question is whether the legacy to the widow was or was not given in lieu of dower. The claim is that ⁵⁸¹ the legacy to the widow is in lieu of dower. It is not so

given in express words, but it is claimed that it is so given by clear implication. We think this claim is not well founded. It is true that the intention to give in lieu of dower need not be declared in express words, but may be shown by implication; but the implication must arise from some provisions of the will plainly inconsistent with the assertion of the right of dower, and the implication must be clear and manifest. This is the rule stated in all our own cases upon this subject, from that of *Lord v. Lord*, 23 Conn. 327, down to that of *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739. In the case at bar there is no inconsistency between the widow's assertion of her right of dower and the provisions of the will, and both may well stand together. Her assertion of her right will in no way defeat, nullify, or interfere with any of the provisions of the will. In addition to this, the presumption is that the legacy to the widow is a matter of bounty and not an equivalent for dower, in the absence of a clear implication to the contrary: *Lord v. Lord*, 23 Conn. 327, 331. On the whole, we are satisfied that the legacy to the widow is not in lieu of dower.

The superior court is advised (1) that Emily Leek Betts is entitled to only one legacy of three thousand dollars, and (2) that the legacy to the widow is not in lieu of dower.

No costs will be taxed in this court.

In this opinion the other judges concurred.

Extrinsic Evidence to Explain Wills is considered in the monographic note to *Chappel v. Missionary Society*, 50 Am. St. Rep. 279-294. Parol evidence is admissible to identify the property and the beneficiaries: *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023; *Gaston's Estate*, 188 Pa. St. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

A Devise or Bequest to a Widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it was to be in lieu thereof: *Hatch's Estate*, 62 Vt. 300, 22 Am. St. Rep. 109, 18 Atl. 814. See, also, *Sutherland v. Sutherland*, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424; *Hunter v. Hunter*, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739.

LEWIS v. LEWIS.

[74 Conn. 630, 51 Atl. 854.]

CONDITIONS SUBSEQUENT—Conveyances, When upon.—A conveyance which purports to be in consideration that the grantee and his successors in interest will furnish the grantor board and washing during his lifetime, and will, without unnecessary delay, remove to and occupy the premises conveyed and continue to do so during such life, and that the grantee and his successors will convey no part of the property during the lifetime of the grantor, gives the grantee an estate upon conditions subsequent. (p. 242.)

CONDITIONS PRECEDENT and Subsequent.—As between conditions precedent and subsequent, the law favors the latter. (p. 242.)

CONDITIONS SUBSEQUENT, What are.—If an act or condition required does not necessarily precede the vesting of an estate, or may accompany and follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act required to be performed and the time required to perform it, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent. (p. 242.)

THE BREACH of a Condition Subsequent does not Ipso Facto Revest the estate in the grantor. To such revesting it is necessary that the grantor or his proper substitute take advantage of the condition by re-entry for a breach thereof. (p. 243.)

CONDITIONS SUBSEQUENT—Breach of Need not be Negatived in Pleading.—In suing to recover possession of real property by one who holds it under a conveyance on condition subsequent, it is not necessary for him to show performance of the condition. If the plaintiff alleges title in himself, he must recover on demurrer, unless his complaint also shows facts essential to the revesting of the title in the grantor. (p. 244.)

ESTATE FOR LIFE—Conveyance, When Restricted to.—Under the statute of Connecticut a conveyance to a grantee for life, and at his decease to his heirs, is ineffectual to convey anything except a life estate to his grantee. (p. 244.)

CONDITIONS SUBSEQUENT—Waiver of Breach of.—If a conveyance is upon a condition that the grantee will provide board and washing for the grantor on the premises conveyed, the voluntary leaving of them by the grantor is a waiver of his rights, and does not create any right on his part or that of his successors in interest to terminate the estate for breach of the condition. (p. 245.)

CONDITIONS SUBSEQUENT—Estoppel to Urge.—One who participates in acts amounting to a breach of a condition subsequent cannot avail himself of such breach to claim a forfeiture of the estate. (p. 245.)

Suit to recover real property and for damages brought by John S., William I., Charles H., and Isadora I. Lewis against Chloe H. Yale, Jennie H. Hall, John S. Winship, and John

Leetch. By the complaint, it was shown that in 1868, John Lewis conveyed to Henry Lewis an estate for life, and to the plaintiff a further estate for life commencing on the death of said Henry in a tract of land; that the latter at once entered into possession of the property and began to support the grantor according to the terms of the conveyance, and so continued to do until October, 1870, when the grantor voluntarily left the premises and never returned; that Henry Lewis and the plaintiff occupied the property from the date of the deed until July, 1871, at which time the original grantor executed a conveyance of the same property to the defendant, William I. Lewis; that on July 10, 1871, Henry also conveyed to the defendant, William I. Lewis, who at once entered into possession of the premises, and continued such possession until March 4, 1878, at which time he conveyed to Charles H. Lewis. He, on March 5, 1878, conveyed to his wife, Isadora, since which time they together have remained in possession of the premises, except a small part; that on October 2, 1871, John Lewis died, leaving a will devising all his estate to William I. Lewis; that on October 13, 1898, Henry C. Lewis died; the other defendants claimed some interest under the conveyance from William I. Lewis to his wife.

The consideration of the original conveyance was expressed as follows: "For and in consideration of the things herein specified to be performed and done by Henry C. Lewis, of the town of Essex in the county and state aforesaid, and in case of the death of the said Henry C. Lewis previous to my decease, then the said acts and things are to be done and performed by his lawful heirs, viz.: My board and washing for and during my natural life; said board shall be deemed to include suitable food or diet both in sickness and in health during the whole period of my life, and when in health at the table of the family in the house where I now reside, and in sickness in my room or rooms which I reserve for my private use in said dwelling-house. And in further consideration that the said Henry C. Lewis shall, without unnecessary delay, remove to and occupy with his family, the dwelling-house herein conveyed, and shall continue to do so during the whole of my natural life."

This deed also reserved to the grantor for his own private use such room or rooms as might be suitable for him to live in in the dwelling-house and the right to use certain parts of the barns and outbuildings.

In the habendum, it was also provided: "And it is further a part of the consideration for which this conveyance is made, that the said Henry C. Lewis or his son, John S. Lewis, shall not sell or in any manner convey to others any part or portion of said premises, nor shall it be done by any guardian or trustee of said minor son, but they shall live on and occupy said premises during their natural lives. To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said Henry C. Lewis and his son, John S. Lewis, for and during their natural lives, and at their decease to their heirs and assigns forever, to and for their proper use and behoof, subject to all the covenants, limitations, and requirements herein contained."

A demurrer interposed to the complaint was sustained by the court and judgment thereon rendered in favor of the defendants. Plaintiff alleged error.

Henry C. White and Edward L. Clark, Jr., for the appellant.

Lewis E. Stanton, Frank D. Haines, and Hugh M. Alcorn, for the appellees.

633 PRENTICE, J. The defendants in this case, other than William I. Lewis, hold under him. It is not claimed that they have any other or greater rights than he, in whose shoes they stand, would have, had he made no conveyances. For convenience of expression, therefore, he will hereinafter be spoken of as the defendant.

The deed in question confessedly gave to the grantees who took under it estates upon express condition. The conditions are clearly conditions subsequent.

As between conditions precedent and subsequent, the law favors conditions subsequent: 2 Washburn on Real Property. **634** 6th ed., sec. 914. The language of the deed is appropriate for the creation of an estate in praesenti: Rogan v. Walker, 1 Wis. 454 (527); Finlay v. King, 3 Pet. 346. Washburn states the rule which has been generally accepted as the correct one, as follows: "If the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after tak-

ing possession, then the condition is subsequent": 2 Washburn on Real Property, 6th ed., sec. 941; Tiedeman on Real Property, 273; Underhill v. Saratoga etc. R. R. Co., 20 Barb. 455. Applying this rule to the provisions of the deed in question, the nature of the conditions becomes unmistakable.

All the authorities agree that the intention of the parties to the deed, as gathered from it and the existing facts, furnishes the test by which the nature of a condition therein is to be determined: 2 Washburn on Real Property, 6th ed., sec. 941; 4 Kent's Commentaries, 125; Rogan v. Walker, 1 Wis. 454 (527); Finlay v. King, 3 Pet. 346; Underhill v. Saratoga etc. R. R. Co., 20 Barb. 455. In the present case the intention of the parties is strikingly manifested. Two of the conditions in the deed are that the two successive life tenants shall not convey their interests, and shall occupy the premises during their lives. Neither of these conditions could, from the nature of them, be fully performed until death had terminated the rights of the grantees to any title or interest in the premises. If no title could, under the deed, vest until performance of the conditions, none could by any possibility ever vest in either of the two life tenants, or in fact in anybody, as we shall have occasion to observe later. Such a construction would make the deed a piece of worthless paper, necessarily conveying nothing. The parties certainly cannot be presumed to have intended such a result. If we add to these considerations the contemporaneous conduct of the parties in respectively delivering and taking possession, their ⁶³⁵ intention that the conditions be subsequent and not precedent is rendered too apparent for discussion.

The estates conveyed to the life tenants, being of the kind indicated, vested immediately, subject only to becoming divested upon breach of condition. A breach of condition would not operate ipso facto to re-vest the estate in the grantor. The title conveyed would not thereby become void. It would become voidable only at the election of the grantor or his heirs, or such other person as by statute was empowered to make the election, and upon the doing of that which the law requires to effectuate such election. Not until the grantor or his proper substitute had taken advantage of the condition and by re-entering for the breach had repossessed himself of the estate, would the grantees become divested: Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Bowen v. Bowen, 18 Conn. 535; Sperry v. Sperry, 8 N. H. 477; Tallman v. Snow,

35 Me. 342; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 15; Underhill v. Saratoga etc. R. R. Co., 20 Barb. 455; Phelps v. Chesson, 34 N. C. 194; Lindsey v. Lindsey, 45 Ind. 552.

These observations, concerning the nature and effect of the deed, effectually dispose of those grounds of demurrer which are based upon the alleged failure of the complaint to aver or disclose a performance of its conditions. The complaint alleges a vested title in the plaintiff. The conditions which might operate to divest the title need not be noticed nor a re-vesting be negatived. Such is the accepted rule with respect to conditions subsequent: Gould on Pleading, c. 4, p. 170; 1 Chitty on Pleading, 246; Phillips on Code Pleading, secs. 329, 348; Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591.

The only remaining grounds of demurrer are to the effect that, as there had been breaches of the conditions of the deed, the right, title and interest of the grantees therein, including the plaintiff, had terminated. These contentions, as we have seen, are based upon an incorrect conception of the law where the condition is a condition subsequent. The defendant's reasons of demurrer were, therefore, not well assigned, and the demurrer should have been overruled.

The plaintiff's contention that there was error in the action **636** of the court does not, however, rest entirely upon the technical ground that the demurrer was not sufficiently comprehensive. The complaint was not open to successful attack as showing that the plaintiff had no cause of action. The complaint, as we have seen, alleges a vested estate in the plaintiff. The effect of these allegations cannot be avoided unless the facts necessary to effectuate a re-vesting of the title in the grantor, to wit, a breach and entry therefor, sufficiently appear.

Before examining the complaint to discover what its allegations are, and their legal effect, let us see what the situation disclosed was. The deed gave to Henry C. Lewis an estate for his life, to the plaintiff an estate for his life beginning in enjoyment at the death of the first life tenant, and left the reversion in the grantor. The attempt to convey the remainder after the decease of the plaintiff, to his heirs, was, under our statute (section 2953), plainly ineffectual. The deed of the original grantor, John Lewis, to the defendant, dated March 10, 1871, therefore conveyed to the latter the reversion. From that time, by virtue of section 1053 of our

statutes, the defendant was possessed of the right to enter for any condition thereafter broken.

The allegations of the complaint, upon which claims of breach of condition are predicated, are three in number, to wit: Nonsupport by Henry C. Lewis, the alienation by Henry C. Lewis of his title and interest in the premises, and non-occupation by him during his life. The only one of these which antedates the deed from John to the defendant, whereby the latter acquired the reversion, is that of nonsupport. The recited facts down to this point of time are effectually disposed of by two observations: 1. That John never entered for a breach; and 2. That no breach is disclosed. John Lewis voluntarily left the premises, where alone by the express terms of the deed he was to have his support, and never returned. His voluntary waiver of his rights, for such was the legal effect of his action, excused the life tenant from the technical performance of his agreement. It does not appear that the latter was not at all times ready and ⁶³⁷ willing to do what he had agreed, and as John's absence is expressly alleged to have been voluntary, there is no room for an inference, even, that it was directly or indirectly compelled by the conduct of his grantees.

Turning to the events recited as having occurred subsequent to the deed to the defendant last referred to, we find that the first life tenant did, contrary to the conditions of the deed under review, convey away his title and interest, and did surrender to another the occupancy of the premises. Here were two breaches of condition. The conveyance, however, was made to this defendant, and the possession of the premises was delivered to him. He was therefore a participant with Henry C. Lewis in the very acts he now relies upon to deprive the plaintiff of his life estate in the premises. It does not, indeed, appear that the defendant and his grantor conspired together to thus create a breach which might be used by the defendant to the plaintiff's injury, but as the deed in question was duly recorded, the defendant is conclusively presumed to have acted as he did with knowledge of the plaintiff's rights. He will not be permitted to avail himself, as against the plaintiff, of the breaches which he was thus directly and with knowledge instrumental in causing.

These conclusive considerations render it unnecessary to examine other questions which the record suggests, to wit: 1. Whether the complaint discloses any entry for condition

broken; 2. Whether the defendant, by virtue of his possession under the deed of July 10, 1871, was excused from doing some act tantamount to an entry clearly indicating his election to avail himself of the breach and his purpose to transform his possession from that of a grantee of a life tenant into that of an owner in fee to the exclusion of the plaintiff's rights; and 3. Whether a breach of condition by the first life tenant could be used to deprive the plaintiff—the second life tenant—of his estate. Upon these questions we express no opinion.

There is error; the judgment is set aside and the case is remanded to be proceeded with according to law.

In this opinion the other judges concurred.

A Deed with a Condition that the grantor agrees to make her home with the grantee, who agrees to provide for and take care of the grantor during her natural life, and to be at all expense that necessarily may accrue for the maintenance of the grantor, is upon a condition subsequent: See the monographic note to *Ecroyd v. Coggeshall*, 79 Am. St. Rep. 764, on what words create a condition subsequent. A forfeiture for a breach of condition subsequent may be waived by express agreement or by acts, and the breach does not ipso facto revest the estate, without a re-entry or some equivalent proceeding: See the monographic note to *Cross v. Carson*, 44 Am. Dec. 746-755.

BARBER v. INTERNATIONAL COMPANY OF MEXICO.

[74 Conn. 652, 51 Atl. 857.]

RECEIVERS—Payment of Claims of—When Authorized.—All claims against a company which is in the hands of a receiver must be submitted to the court in which the receivership proceedings are pending for its approval before any payment of them from the defendant's assets can be ordered. (p. 248.)

RECEIVERSHIP—Application for Payment of Claim—When may be Heard.—The state of the case at which all or any of the claims shall be submitted is to be determined by the court, and when the receiver himself holds a large claim against the estate, the court may hear a motion for its approval before any assets can be collected applicable to its payment. (p. 248.)

A JUDGMENT of a Circuit Court of the United States for California stands, in respect to its proof and also to its essential nature, on the same footing as if it had been rendered by another court in this state. (p. 248.)

THE STATUTE of Limitations of Connecticut does not Run Against a Judgment of a court of that state or of the United States. (p. 249.)

A JUDGMENT is not Presumed to have been paid until after twenty years. (p. 249.)

APPELLATE PROCEDURE—Orders Made After the Appointment of a Receiver.—A judgment appointing a receiver never terminates a cause. It remains the duty of the court to make whatever orders may be necessary from time to time to settle the rights of all the parties claiming an interest in the estate, and any such order, if final in its nature as to the particular parties and matters affected by it, may be the subject of a separate appeal. (p. 249.)

A RECEIVER Should not be Authorized to Employ Counsel in a Suit in Which He may be the Plaintiff, and the corporation of which he is receiver defendant, for a defense dictated by the plaintiff in the cause is no defense. (p. 250.)

JUDGMENT FOR MONEY—What is not.—An order of court, in a cause in which a receiver has been appointed reciting due prosecution of his claim and its nature and amount, and that such amount less certain offsets is a valid claim against the defendant, is not a judgment for money and does not merge or change the character of the claim to be allowed. (p. 250.)

In this case, within four months after the entry of the judgment appointing the receiver, he presented to himself his individual claim as the assignee of a judgment entered in the United States circuit court for the district of California. To this claim the defendant filed an answer alleging that it did not accrue within six years before its presentation and denying "the facts set up in the claim." The plaintiff also moved for an order that as receiver, in bringing suit against the Mexican Land and Colonization Company, Limited, as authorized by the judgment and order of this court, he might commence suit in his own name as receiver and in the name of the International Company of Mexico, and employ counsel to represent the defendant, an American company, before the high court of justice of England. When the motions were heard, a demurrer having been interposed to the defense of the statute of limitations, it was overruled, and an order was made that the receiver be authorized to bring and maintain all actions and suits in any of the courts of the United Kingdom of Great Britain and Ireland in his own name as receiver, or in the name of the International Company of Mexico, or otherwise, necessary to secure and collect the judgment in question, and that the receiver might employ solicitors and counsel to represent himself as such receiver, and also to represent and act for the International Company of Mexico, and it was further adjudged that the plaintiff, at the date of the commencement of this action, September 26, 1895, had a good and valid claim against said International Company of Mexico on account of such judgment in the sum of one hundred

and twenty-one thousand two hundred and eighty-two dollars, with interest, less a payment made thereon on January 18, 1892, of eight hundred and forty-one dollars and twenty-five cents, with interest, and that there was due the International Company of Mexico from the plaintiff on account of costs taxed against him in the high court of justice the sum of fifteen hundred and twenty dollars, and interest. From this order confirming the claim of the receiver based upon such judgment and authorizing him to bring an action thereon, an appeal was taken.

Edward D. Robbins, George A. Kellogg, and Andrew J. Broughel, Jr., for the appellant.

Charles E. Perkins and Lewis E. Stanton, for the appellee.

655 BALDWIN, J. All claims presented against a company which is in the hands of a receiver must be submitted to the court in which the receivership proceedings are pending, for its approval, before any payment upon them from its assets can be ordered. The stage of the cause at which all or any of them shall be submitted is to be determined by the court. In view of the fact that the receiver of the defendant company held so large a claim against it, it was fully within the discretion of the superior court to hear his motion for an order of approval or confirmation before any assets had been collected which could be applicable to its payment.

It is contended that the claim was barred by the statute of limitations (Gen. Stats., sec. 1371), which provides that no action on any simple or implied contract shall be brought but within six years next after the right of action shall accrue.

We have no occasion to inquire whether the obligation arising from a foreign judgment, or one of a sister state of the United States, could be regarded as resting on a simple or implied contract: See *Hubbell v. Coudrey*, 5 Johns. 132; **656** *Andrews v. Montgomery*, 19 Johns. 162, 10 Am. Dec. 213; *Little v. McVey* (N. J.), 47 Atl. 61. The courts of the United States and those of the states are courts of the same country: *Claffin v. Houseman*, 93 U. S. 130, 137. A judgment of the circuit court of the United States for the southern district of California stands, in respect to its proof and also to its essential nature, in any court of Connecticut, on the same footing as if it had been rendered by another court

of this state: *Adams v. Way*, 33 Conn. 419, 429; *Turnbull v. Payson*, 95 U. S. 418, 424; *Morgan v. New York National etc. Assn.*, 73 Conn. 151, 154, 46 Atl. 817.

A domestic judgment is a contract of record. It is the highest form of obligation. In one sense, it may be termed a contract by specialty: 1 *Parsons on Contracts*, *7; *Walker v. Powers*, 104 U. S. 245, 248. In another, it may be regarded as raising an implied contract: *Denison v. Williams*, 4 Conn. 402, 403. But it is neither a contract under seal nor an implied contract, within the meaning of our statutes of limitation: *Gen. Stats.*, secs. 1370, 1371. Such statutes rest on two grounds: The improbability that one having a valid demand against another will delay long to enforce it by suit; and the injurious consequences of such a delay, flowing from natural lapses of memory and loss of evidence. But there is seldom any reason why one who has put a claim into a domestic judgment should proceed otherwise than by execution; and never any danger that, should no suit be brought upon it, the judgment debtor may be prejudiced by loss of evidence as to the merits of the original demand. The rule of the common law, therefore, by which a *prima facie* presumption of payment arises after twenty years, presents the only limitation of time to the collection of a domestic judgment which is recognized in this state: *Boardman v. De Forest*, 5 Conn. 1, 8.

The California judgment was rendered in 1892, and irrespective of the effect, if any, of the bringing of the present action in 1895, no presumption of payment had arisen when the defendant filed its answer in 1901.

It is assigned for error that the order appealed from is a ⁶⁵⁷ further judgment rendered after a final judgment. A judgment appointing a receiver never terminates a cause. It remains the duty of the court to supervise and direct his conduct as receiver, and to make whatever orders may be necessary from time to time to settle the rights of all parties claiming an interest in the estate; and any such order, if final in its nature, as to the particular parties and matters affected by it, may be the subject of a separate appeal: *Links v. Connecticut River Banking Co.*, 66 Conn. 277, 283, 33 Atl. 1003.

The judgment appointing the plaintiff receiver did not specifically authorize him to bring suit at his option either in his own name as receiver or in that of the defendant, nor

to employ counsel to represent the defendant, before the English courts, nor to bring any suit to collect the circuit court judgment. It was within the power of the superior court, by a supplementary order, to authorize any such forms of proceeding, so far as they might be necessary to accomplish the purposes of the receivership. It is not impossible that a suit on the judgment in the name of the plaintiff as assignee may, under the rules of English law, be deemed requisite as a step toward enforcing the obligation of the contract between the defendant and the Mexican Land and Colonization Company, Limited, in favor of the defendant's creditors. In such case he could as properly sue in his own name as, if the judgment had never been assigned to him, he could have sued, with the consent of Bates and by permission of the court, in the name of Bates.

The order now in question, however, went beyond this. It authorized him to bring suits to collect the judgment, in his name as receiver, or in that of the defendant "or otherwise," and to maintain any such suits then pending, and to employ counsel to represent the defendant, if a party to any such suit, either as plaintiff or defendant. It was an error to empower the receiver, in a suit in which he might be a plaintiff and the company of which he is such receiver a defendant, to employ counsel to represent the company. There could be no object in any such proceeding for making the company a defendant, except to support an adjudication affecting ⁶⁵⁸ its rights: and when thus brought in as a party, it must, like every other defendant in a court of justice, be accorded an opportunity to be heard and fairly heard: *McVeigh v. United States*, 11 Wall. 259, 267. A defense to be dictated by the plaintiff in the cause is no defense.

There is nothing in the objection that the order appealed from is a money judgment in favor of the plaintiff, although his complaint asked for no such relief and laid no foundation for it. It is simply what it is entitled, an "Order upon motion for permission to the receiver to bring suits and other acts, and confirming the claim of Clarence L. Barber." It settled, for the purposes of the cause, the validity and amount of this claim, but did not change its character or merge the judgment upon which it rested.

There is error only in the form of the order in the particular above stated, and the cause is remanded to the superior court for the correction of the order, so that it shall not pur-

port to empower the plaintiff to control the course of the defendant in any suit in which he may appear, either individually or as receiver, as an adverse party to it.

In this opinion Torrance, C. J., and Hall and Prentice, JJ., concurred.

HAMERSLEY, J., concurring in result. I concur in the results reached by the court, in the propositions involved in those results and upon which they rest, as appears in the opinion, and in the mandate to the superior court, so far as it goes, but I think it should go further.

The order appealed from contains two distinct and independent orders, made in response to separate independent motions, as appears in the statement of facts. The first grants permission to the receiver to exercise his discretion in bringing suits, and in the manner of bringing suits as authorized by the judgment of June 22, 1900; this appears in the first three sentences of the order. The second confirms the claim of Clarence L. Barber, presented to the receiver in pursuance of the order limiting the ⁶⁵⁹ time for presentation of claims, and allowed by the receiver; this appears in the remaining portion of the order.

The main ground of appeal is that each order is in fact a further judgment rendered after a final judgment.

The judgment of June 22d found the material issues raised by the pleadings in favor of the plaintiff, and thereupon granted the relief demanded in the prayer for relief. There is, and can be, no contention but that this judgment, as affirmed by this court (*Barber v. International Co.*, 73 Conn. 587, 48 Atl. 758), is final between the parties to the complaint, and cannot be amended by a further judgment between the parties, in respect to the allegations of the complaint and the relief demanded. It is equally clear that the judgment does not terminate the cause; it remains the duty of the court to administer the relief granted, by supervising the conduct of the receiver and making such orders as may be necessary to settle the rights of all parties to the receivership proceedings.

The relief demanded and granted was the appointment of a receiver to receive and collect debts due the defendant, and other property belonging to it, and to enforce rights belonging to it; and for such purposes to maintain suits in any jurisdiction, which may be necessary to obtain payment of said debts or enforcement of said rights, and especially to bring

such suits in England, in order to enforce against the English company the contract of May 4, 1889, made between that company and the defendant. The equity in the plaintiff enforceable against the defendant, held to support the judgment, and the nature and extent of the relief granted by that judgment for the purpose of enforcing such equity, appear in the record of the former appeal; it is also included in the record now before us, and in the opinion announcing our affirmance of the final judgment.

The first order now appealed from purports to give special authority to the receiver to bring suits in the English courts, and a wide discretion as to his mode of procedure. Such permission, of course, applies to suits authorized by the judgment of June 22, 1900, as stated in the motion asking for permission; that is, to suits necessary for the purpose of ⁶⁶⁰ the receivership established by the judgment. Whether or not there is necessity for this special permission is a question not before us; such permission is clearly not a judgment, nor is it an order settling any rights of parties to the receivership proceedings.

But this order goes further. It purports to give the receiver, and possibly the plaintiff, authority to make the defendant corporation a defendant in suits he may bring against it, and authority to enter an appearance for it and to dictate its defense. Such authority plainly gives relief not authorized by the final judgment, and is not only inconsistent with that judgment, but inconsistent with principles that limit all judicial action. Whether regarded as an order, or as a further judgment after final judgment, it is invalid.

The second order is in legal effect a mere confirmation of a creditor's claim allowed by the receiver. However inappropriate its language may be, its legal effect is certain. It is not an adjudication between Barber and the company as plaintiff and defendant in the action, in respect to the allegations of the complaint, but is simply a determination upon motion of the receiver in respect to a creditor's claim filed with the receiver in pursuance of the order limiting the time for presentation of claims, settling, for the purposes of the receivership proceedings and distribution of assets, the validity and amount of the claim. It is not a money judgment against the defendant, nor is it a further judgment rendered after a final judgment.

We hold that a portion of the order is invalid, because it

attempts to add, to the relief granted, further relief inconsistent with the final judgment and obnoxious to settled principles of law.

We hold that other portions of the order are not invalid, because they are not inconsistent with, and do not add to, the relief granted by the final judgment; because they are merely discretionary orders in the administration of that relief for the purposes of the receivership as defined by the judgment.

It is therefore proper that the order should be remanded ⁶⁶¹ not only for the excision of that part which is invalid, but also for the correction of the remainder, whose validity depends on our construction of the language in which it is expressed, so that the language may clearly conform to the true meaning and legal effect of the order as determined by our decision. The claim that we have no control over the language of the order, under such circumstances, seems to me unfounded.

It is suggested that having determined the meaning of the order upon the language used, the correction of that language so as to conform to the meaning given it is unnecessary; and that the language used, in view of our construction, can do no harm. Probably this is true; certainly it can do no good.

The record shows no reason for the use of such peculiar phraseology, and no reason was advanced in argument except the statement of plaintiff's counsel that it was dictated by the plaintiff's English counsel in litigation pending in England between the plaintiff and the English company.

It is undoubtedly true that the order is not made for home consumption. There is nothing in this jurisdiction upon which it can operate, and it can have no force elsewhere except that which may be given it by a foreign court. There seems all the more reason, therefore, for exactness in framing the order. In such case harmlessness can hardly be affirmed of language which requires judicial construction to impress upon it a meaning necessary to support the validity of the order.

The order should be remanded to the superior court for correction of the error in substance, and that the language of the remaining portion may be reformed so as to clearly express the true meaning and legal effect of the order as settled by the decision and opinion of the court.

A Judgment is not a contract in the full sense of the term: See Anglo-American Provision Co. v. Davis Provision Co., 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608, and cases cited in the cross-ref-

erence note thereto. A judgment has been held not to be a contract within the meaning of the statute of limitations: See *Dudley v. Lindsey*, 9 B. Mon. 486, 50 Am. Dec. 522; *Dore v. Thornburgh*, 90 Cal. 64, 25 Am. St. Rep. 100, 27 Pac. 30. State courts must give the same force and effect to a judgment of a circuit court of the United States that they give to a judgment of a court of their own state: *Oceanic etc. Co. v. Compania etc.*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987. See, too, *Wonderly v. Lafayette*, 150 Mo. 635, 73 Am. St. Rep. 474, 51 S. W. 745.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

FRIEDMAN v. LESHER.

[198 Ill. 21, 64 N. E. 736.]

APPELLATE PROCEDURE—Final Judgment.—The judgment of the appellate court reversing and remanding, with instructions to proceed in conformity with the views expressed in the opinion, is final, and hence may be reviewed on appeal. (p. 258.)

RES JUDICATA—Judgment, When not Final so as to Support Plea of.—A judgment of the appellate court reversing a cause and remanding it without directions is not final so as to support the plea of res adjudicata. (p. 258.)

PREFERENCES—Right of a Creditor to Make.—Though the law looks with favor upon the equitable distribution of the assets of an insolvent among his creditors, it gives him the right to prefer one creditor to others. (p. 259.)

AN EXECUTION Lien Attaches to All the Property of the Defendant Subject to Execution when it comes into the hands of the sheriff, and has precedence over an assignment for the benefit of creditors, which has not before that time become legal and perfect, so as to vest title in the assignee. (p. 259.)

RATIFICATION of an Unauthorized Act, Though in Other Respects It Relates Back to the Date of Such Act, Cannot do so to the Prejudice of Intervening Rights. Hence the ratification of an unauthorized assignment for the benefit of creditors cannot give it precedence over the lien of an execution received by a sheriff before such ratification by the making of the unauthorized assignment. (p. 259.)

CORPORATIONS—Assignment for the Benefit of Creditors of. Neither the president, vice-president, nor any other officer of a corporation has authority to make an assignment in its behalf for the benefit of its creditors unless previously authorized by resolution of its board of directors. (p. 259.)

CORPORATIONS—President, Authority of to Make an Assignment.—The Fact that the President of a Corporation Owns a Large Majority of Its Capital Stock does not give him power to execute in its behalf an assignment for the benefit of its creditors. (p. 260.)

John S. Stevens, for the plaintiff in error.

Alden, Latham & Young, for the defendants in error.

22 WILKIN, J. The M. H. Vehon Company was incorporated under the laws of this state February 28, 1895, with a capital stock of \$6,000. The shares of stock were \$100 each, of which Morris M. Vehon owned four, A. Strumpf six, and Marie H. Vehon fifty. These three stockholders were the directors of the company, Morris H. Vehon being the president, and Marie H. Vehon, his wife, vice-president. Within a year of its organization the company became embarrassed financially. Prior to February 10, 1896, it had executed to Jacob H. Leshner and John H. Bobo, as J. H. Leshner & Co., a judgment note for \$1,500. On the evening of June 5th, Morris H. Vehon, the president and general manager of the company, suddenly died. On the following morning Marie H. Vehon, as vice-president, without authority from the board of directors, executed and delivered a deed of voluntary assignment, under the statute, for the benefit of the company's creditors. That instrument was recorded at 9:25 A. M. June 6th, and filed with the clerk of the county court at 9:30 A. M. the same morning. At 9:27 A. M. of the same day Leshner & Co. entered a judgment in the circuit court of Cook county upon their note, for \$1,550, and caused an execution to be immediately issued, which was delivered to the sheriff of the county at 9:35 A. M., and he instructed to levy upon the tangible property of said M. H. Vehon Company. On reaching the company's place of business he found the assignee in possession of the same and of all its property, and he therefore returned the execution at the end of ninety days, unsatisfied. About 8 o'clock P. M. of the same day, June 6, 1896, the two surviving directors met and ratified the making of the assignment. Claims were filed against the insolvent estate amounting to ²³ \$9,234.22, \$1,629.04 of which was the claim of Leshner & Co., \$1,557.16 of that amount being the judgment by confession so obtained on the 6th of June, for which they claimed a lien upon the company's assets and priority over the other creditors. The total assets of the insolvent estate were \$2,738.93. Upon the hearing in the county court the claim of priority was sustained and the assignee directed to pay the judgment in full. The assignee prosecuted an appeal from that order to the appellate court for the first district. The branch of that court to which the record was assigned re-

versed the order of the county court and remanded the cause generally. It was then stipulated by the parties that the cause should be reheard upon the complete record as filed in the appellate court on the appeal, "and such other evidence as either of the parties might offer." Upon that hearing an order was entered by said county court January 12, 1901, denying the petition of Leshner & Co. for a preference, but allowing their claim as a general claim against the assigned estate. From that order they prosecuted an appeal to the appellate court for the first district, which, on December 12, 1901, filed an opinion, in which it was stated that the judgment of the county court was reversed and the cause remanded to that court for further proceedings in conformity with the views expressed in the opinion. It seems that the clerk, in entering the order of remandment, made it read, "such further proceedings as to law and justice may appertain." Subsequently, at the same term, the appellants entered a motion to correct that entry so as to make it conform to the judgment actually rendered, as shown by the opinion filed, which motion was allowed, but instead of amending the former order made, the clerk entered an original one, "remanding the cause for further proceedings in accordance with the views herein expressed." Thereupon a further motion was made on February 15, 1902 (as shown by the additional record heretofore allowed to be filed in this ²⁴ court), to correct said last-mentioned mistake, which was granted and the final judgment corrected so as to read: "The order and judgment of the county court of Cook county in this behalf rendered be reversed, . . . and that this cause be remanded to the county court of Cook county for further proceedings in accordance with the views expressed in the opinion of this court this day filed herein." From that judgment the plaintiff in error, assignee of the M. H. Vohon Company, prosecutes this writ of error.

The defendants in error have entered their motion to dismiss the writ upon the ground that the judgment of the appellate court is not final, which motion has been taken with the case.

The proceeding in the county court was an equitable or chancery proceeding. The only issue in that court was whether or not defendants in error were entitled to a preference over the other creditors of the estate. The court found the issue against the claimants. The appellate court, it is true, reversed the judgment and remanded the cause to the county court, but it did so with special directions to proceed

according to the views expressed in its opinion, which opinion finally disposed of the issue below. If the cause had been reinstated in the county court, all that court could do would be to carry into effect the directions of the appellate court. Section 90 of the practice act allows appeals from and writs of error to the appellate court in all cases where the judgment, order or decree of that court is such that no further proceedings can be had in the court below except to carry into effect its mandate and directions: Hurd's Stats. 1899, p. 1297; Englewood Connecting Ry. Co. v. Chicago etc. R. R. Co., 117 Ill. 611, 6 N. E. 684; Platte Valley State Bank v. National Livestock Bank, 155 Ill. 250, 40 N. E. 621. Had the order of remandment been general, or with directions to the court below to proceed as the order was first entered—that is, for “such further proceedings as to law and ²⁵ justice shall appertain”—then the case would have been opened up in the county court generally; or if the action had been at law, in which case either party would be entitled to a jury, the order would not have been final, within the meaning of the statute. On this record we entertain no doubt that by the terms of the statute a writ of error will lie, and therefore the motion to dismiss will be denied.

On the merits of the case it is first insisted by the plaintiff in error that the judgment of the branch appellate court on the first appeal from the order of the county court is res judicata. With this contention we cannot agree. The judgment of that court reversed the decree of the county court and remanded the cause without directions. Lasher & Co. could not have prosecuted an appeal or sued out a writ of error to review that judgment, because it was not final. It could not, therefore, be conclusive between the parties: Linington v. Strong, 111 Ill. 152; Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754; Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743. Nor did the parties understand or treat that judgment as an estoppel upon the second hearing. They stipulated for the introduction of further evidence, and very material and important additional testimony was offered, overcoming completely the presumption, as held by the branch appellate court, that the board of directors had authorized the assignment made by the vice-president. The judgment of reversal by the branch appellate court could have no proper bearing upon the merits of the case on the second hearing.

The law undoubtedly looks with favor upon an equitable distribution of the assets of an insolvent among all his or its creditors, but in doing so it cannot ignore the legal right of a creditor to a preference over others, where that right is legally established. When the execution in favor of Leshier & Co. came into the hands of the sheriff of Cook county it at once became a lien upon all the property and assets of the defendant, the M. H. Vehon ²⁶ Company, then liable to execution (Hurd's Stats. 1899, c. 77, sec. 9), and therefore, unless the rights of the assignee had at that very time legally attached, the execution creditors were entitled to the preference given them by the judgment of the appellate court. This question must, we think, depend upon the validity of the assignment made by Mrs. Marie H. Vehon on behalf of the company, as its vice-president, at the time it was executed and filed in the county court, because the execution was delivered to the sheriff before the ratification of that assignment, and although the affirmance or ratification of an unauthorized act will relate back to the date of the act, it cannot be held to do so to the prejudice of intervening rights: *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82; *Norton v. State Nat. Bank*, 102 Ala. 420, 14 South. 872. This we do not understand counsel for the plaintiff in error to deny. Nor can it be denied, as a general rule, that neither the president, vice-president or other officer of a corporation can lawfully make an assignment for the benefit of creditors without being authorized to do so by the board of directors. "Unless otherwise provided by statute, the general rule is, that a corporate assignment must be executed by the board of directors, or a quorum thereof, at a meeting duly called for that purpose, or by the president or some other officer of the corporation, as authorized by the directors": 3 Am. & Eng. Ency. of Law, 2d ed., 24, and cases cited in note 2; 4 Thompson on Corporations, sec. 4636; *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82.

Plaintiff in error, by the argument of counsel, bases his case upon the proposition that "the execution of the assignment, under the circumstances of this case, was effectual, as being a proper exercise of the power vested in the vice-president." We have examined with care the authorities cited in support of the statement and do not think they are in point, and we have been unable to discover authority for holding, in a case like

this, where it expressly appears that the assignment was made without ²⁷ any authority whatever from the directors of the corporation, that the right to do so may be implied. It is perhaps true that in the absence of proof to the contrary such authority would be presumed. But that is not this case. The president being dead, the vice-president could, under the exigencies of the case, act in his stead; but neither she nor the president could convey or transfer the property of the corporation without the consent of the board of directors, who alone were authorized to represent the stockholders. It is true the vice-president owned a large majority of the shares of stock; but that fact could not vest her with any additional power. Even if it were true that a crisis in the business of a corporation would justify the president (or vice-president) to make an assignment of its property without authority from the directors—which we do not concede—we are unable to see in this case that there was such a crisis. The company was manifestly insolvent for a long time prior to the assignment, and the only motive apparent for making it at that particular time was to prevent the defendants in error from gaining a preference over other creditors. Within a few hours after the deed was executed a meeting of directors was called and held, at which the assignment was ratified. There is nothing to show that the emergency required the action of the vice-president before that meeting could be called, except the purpose of preventing the defendants in error from collecting their debt—an emergency or crisis which, if not always, generally prompts an assignment for the benefit of creditors.

We are of the opinion that the judgment of the appellate court is in conformity with the law and facts as shown by the record, and it will accordingly be affirmed.

A Debtor in Failing Circumstances may prefer one of his creditors to the exclusion of others: *Sibbler v. Hartley*, 201 Pa. St. 286, 50 Atl. 956, 88 Am. St. Rep. 811, and cases cited in the cross-reference note thereto. And this rule is applicable to a corporation debtor: *Wilson v. Stevens*, 120 Ala. 630, 29 South. 678, 87 Am. St. Rep. 86, and cases cited in the cross-reference note thereto.

An Assignment for the Benefit of Creditors by an insolvent corporation must be made by resolution of the board of directors: *Calumet Paper Co. v. Haskell etc. Print. Co.*, 144 Mo. 331, 66 Am. St. Rep. 425, 45 S.W. 1115. An assignment by the proper corporate officers, by authority of the directors, is valid, however, without a vote of the stockholders: *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

BAKER v. McCLURG.

[198 Ill. 28, 64 N. E. 701.]

FIXTURES Placed in a Building for the Purpose for Which It was Erected.—The fact that a building is erected in accordance with plans approved by the intended lessees for the purpose of carrying on their business as bakers, and for that purpose is fitted up with ovens, does not establish that such ovens and the trade fixtures connected therewith and placed in the building by the tenants become a permanent part thereof, so as to lose their character as trade fixtures and render their removal at the expiration of the term unlawful. (p. 264.)

FIXTURES—Removal of—When does not Injure Building so as to be Forfeited.—That the removal of an oven will leave the original openings in two floors, as well as in the cement floor of the basement, and that such removal must be by taking down the ovens brick by brick, does not prove that the ovens, when affixed by the tenant, became a part of the realty, nor that their removal would necessarily injure the freehold. (p. 264.)

FIXTURES—Removal of Which will Change Their Identity and Character.—That the taking down of ovens brick by brick and removing the iron of the structure piece by piece would change the form of the original structures for the time being is clear, but this change in the identity and character of the fixtures is not sufficient to make their removal unlawful. (p. 265.)

FIXTURES—Trade—Tests of Removability of.—To determine the irremovable character of fixtures three tests are by the modern authorities applied, viz.: 1. Actual annexation to the realty or some appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is put; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold. (p. 268.)

FIXTURES—Forfeiture by Taking a New Lease.—Where, at the expiration of a lease during which trade fixtures had been erected on the premises by the tenant, a new lease is taken by him containing no reservation of any right or claim to fixtures of the tenant still remaining on the premises, and no recognition of his right to remove them, they cannot be removed by him during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous. (p. 268.)

FIXTURES—Cancellation of Old Lease and Taking New Before the Expiration of the Term.—Where a member of a partnership which has leased premises desires to retire from the firm and to be released from the lease, and for that reason a new lease is given to the partner remaining in business for the balance of the original term, which lease is but a reiteration of the former lease, except that it contains a permission to the lessee to make an assignment, he does not forfeit his right to remove trade fixtures placed on the premises under the original lease. (p. 269.)

Bill to restrain the removal of certain trade fixtures. The trial court dismissed the bill. An appeal was taken to the

branch appellate court for the second district, where the following opinion was pronounced:

28 "Appellants are owners of premises on Green street, Chicago, upon which, pursuant to an agreement 29 in writing made in October, 1890, they erected a two-story and basement brick building, and by a written instrument dated January 15, 1891, leased the same to appellee McClurg and one George C. Aldrich, at that time composing the firm of McClurg & Aldrich. The building was erected and was rented to be used for a bakery. Upon taking possession under their lease said McClurg & Aldrich proceeded to erect three ovens in the building, and also placed therein an engine, boiler, shafting, pulleys, wheels, etc. The principal oven, called a 'reel' oven, extended from foundations laid in the earth below the basement floor, through the first and second stories, nearly to the roof of the building. Square openings had been left in the several floors, including the cement floor of basement, when the building was erected, pursuant to the plans and specifications agreed upon between the parties, in order to enable said oven to be so built. This oven was built by the tenants upon foundations of its own, contiguous, but not attached, to the north wall of the building. These foundations were laid (necessarily, because of the projection of certain of the footings of the building's foundations within the space to be used for the purpose) partly upon said footings, the rest of the oven's foundations being laid upon or within the earth. Upon said foundations an arch was erected, on which the oven stands. The other two ovens erected by the tenants, known, respectively, as the 'Fish oven' and the 'Peterson oven,' rest likewise upon separate brick foundations, in part resting also upon the footings of the building wall, but do not extend quite to the basement ceiling. The boiler is inclosed in a brick masonry jacket, separate from the brick wall of the boiler room in which it stands, said room being outside of and connected with the main building.

"The lease to McClurg & Aldrich provided for a term of ten years, from January 15, 1891, until January 14, 1901. A new lease was, however, made for the balance of the 30 same term by mutual agreement, December 2, 1891, owing to the withdrawal of Aldrich from said firm and his desire to be released from liability. It was executed by and between appellants and appellee McClurg alone. Except that the lessee is McClurg alone, the second lease is in substance and

effect practically identical with the original. It contains, however, one additional provision, viz., a consent of the lessors to its assignment to the McClurg Cracker Company. The business of McClurg and the McClurg Cracker Company, together with the leasehold interest, has since been transferred to the National Biscuit Company, but no formal assignment of the lease was made by McClurg.

"Just before the expiration of the end of the term the appellees were commencing to remove the ovens and fixtures, when appellants filed a bill to restrain such removal and obtained an interlocutory injunction. Upon hearing, that injunction was dissolved and the bill dismissed. From this decree the present appeal is taken."

OPINION.

"The question to be determined is, whether the appellees are entitled to remove the ovens, engine and other fixtures erected by them upon the leased premises and claimed as trade fixtures.

"It is contended in behalf of appellants: 1. That the building upon the premises leased to McClurg & Aldrich January 15, 1891, was erected and designed as a bakery, and that the ovens were erected by the tenants in pursuance of the same purpose and design and became therefore a part thereof; 2. That the removal of the ovens would result in material injury to the premises; 3. That such removal would destroy their identity as ovens and their character as fixtures; and it is urged the law is that fixtures are not removable where they are placed in a building to carry out the design and purpose for which the building to which they are attached was erected or to permanently increase its value for occupation, nor where their removal would injure the freehold or destroy ³¹ their identity as fixtures. In the second place it is contended that when the original lease to McClurg & Aldrich was canceled, appellee McClurg took a new lease of the same premises without reserving therein any right to remove the fixtures in controversy, and that he thereby lost the right to remove them, even if such right had before existed.

"The facts in the case are mainly settled by stipulation. There are, however, according to appellants' counsel, two controverted questions of fact, viz., whether the ovens were erected to carry out the purposes for which the building itself was designed, and what, if any, injury would result to

the premises from their removal. But the alleged controversy is, rather, what conclusions are to be drawn from conceded facts, than as to the facts themselves. It is stipulated the building was erected in accordance with plans prepared and submitted to the lessees, McClurg & Aldrich, and by them approved as suitable for the uses to which they were intending to put it. They intended to and did use it as a bakery, and with that intention and for that purpose erected the ovens in question. So far, therefore, as the building was planned for the purpose for which the tenants intended to use it, both building and ovens were constructed with the same immediate end in view. But it does not necessarily follow from that fact that the ovens and trade fixtures became thereby a permanent part of the building, or so entered into and influenced its character and construction that without them the ultimate design and purpose of the building would be frustrated. It is doubtless true that they were put in for the same purpose for which the building itself was intended during the term of the lease; but that fact is not enough to justify the conclusion that the building was designed and intended for a bakery, and nothing else, after the expiration of the term, and that it is unsuited to other uses. The evidence does not so indicate. The only material difference of construction ³² distinguishing it from other buildings designed for any business requiring the use of machinery, appears to be that openings were left in the floors for the erection by the tenants of the 'reel' oven. With these closed, we find in the evidence no reason to suppose that the building was not designed and is not adapted for any of the ordinary uses of buildings of its general character as well as for a bakery. If so, the bakery fixtures are not irremovable because of the purpose for which the building was erected; neither did they enter into its ultimate design and purpose to any greater extent than ordinary trade fixtures put in by a tenant and suited to his special business. Nor is it apparent that the building itself will be injured by their removal. It is true, the removal of the 'reel' oven would leave the original openings in the two floors, as well as in the cement floor of the basement. But these were left when the building was erected, and if they should be filled in by the tenants to correspond with the rest of the building, as may be the latter's duty in equitable compliance with their covenants, it is difficult to see wherein the freehold would be injured. It is also

true, doubtless, that the brick structure of the ovens, when removed, would have to be taken down brick by brick: but this need not be injurious to the building or premises if the work should be properly done. We conclude, therefore, that the facts do not justify the conclusion that the ovens became necessarily a part of the building by reason of the purposes for which both building and ovens were constructed, nor that the removal of the fixtures would necessarily injure the freehold.

"But it is said that fixtures are not removable if by removing them their identity and character as fixtures are destroyed. That taking down the ovens brick by brick, and removing the iron of the structure piece by piece, would change the form of the original structures for the time being is made clear by the evidence and is obvious. It could never again be precisely the same ³³ structure of brick and mortar as before, but the iron work would doubtless retain its identity even though taken down in pieces and subsequently re-erected, and there is evidence tending to show that the ovens can be profitably removed and re-erected by the tenant.

"The ovens in question were, when erected by the lessees, as the evidence tends to show, intended for trade fixtures. This intention is clearly indicated by the conduct of the tenants. The ovens were not attached to nor made a part of the structure of the building. They were built within it but not of it. They were not joined to its walls nor to its foundations. These facts of construction certainly tend to sustain the contention of appellees that it was the intention at the time they were put up to have them removable. There is other evidence of such intention and understanding afforded by the bills of sale transferring the machinery, fixtures, ovens, etc., from Aldrich to McClurg, from McClurg to the cracker company, and from the latter to the biscuit company. That this was also the view of the landlords is, we think, apparent from the conduct of the latter. One of the appellants testifies to having visited the premises shortly before the expiration of the term of the leases, looking the fixtures all over, including the engine, boiler, shaftings and steam heating plant, and asking appellee McClurg 'to put a price on it, and also to include the ovens.' He states that McClurg told him he would not include the ovens, and that afterward he (appellant) 'again asked him to throw in the ovens; we would buy the whole thing.' Whatever may be the effect of this

testimony in other respects, it does tend to show an understanding on the part of both parties at that time that the fixtures were the property of appellees, and removable. There is no evidence of any other intention or understanding during the whole of the ten-year term.

"There is some conflict of authorities as to whether fixtures are removable when by removal they are liable ³⁴ to suffer substantial injury. In *Collamore v. Gillis*, 149 Mass. 578, 14 Am. St. Rep. 460, 22 N. E. 46, it is said that 'in determining whether an addition by the tenant to a leased building is removable or not by him during his term, the chief thing to be considered is the mode of its annexation, and whether it can be removed without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance. We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed or reduced to a mere mass of crude materials.' But in *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327, it is said: 'The tendency of the modern cases is to make this a question of what the intention was with which the machine was put in place.' The rule in Illinois is liberal in favor of the tenant. As between him and the landlord, removable trade fixtures may include all erections made for the purposes of trade during tenancy 'which he may have attached to the freehold while in possession, such as soap-vats, engines, a working colliery, pans used in manufacturing salt, brew-houses, furnaces, greenhouses and hothouses erected by nurserymen and gardeners': *Moore v. Smith*, 24 Ill. 137. Ordinarily, such things cannot be removed without injury to the material composing them. No reason is perceived why, in the nature of things, an exception should be made in the case of ovens, engine, boiler and other fixtures such as those here in controversy. It has been held that a two-story house, with brick chimney and foundations, was so removable: *Van Ness v. Pacard*, 2 Pet. 413. In *Wiggins Ferry Co. v. Ohio etc. R. R. Co.*, 142 U. S. 396, 12 Sup. Ct. Rep. 188, it is said: 'Indeed, it is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term.' In the case of *Moore v. Wood*, 12 Abb. Pr. 393, it was held that a brick chimney

³⁵ extending through the roof and with its foundations three feet in the earth, erected for trade or manufacturing purposes by the tenant, might be removed. The court says: 'It was not movable without taking it down, and was in every respect a ponderous structure. Nevertheless, under the circumstances of the present case it was not a fixture. The rigor of the ancient law of fixtures has yielded, and must continue to yield, to the contingencies of modern times. The law must take notice of trade and manufactures and their wants, and afford to them adequate and appropriate protection.'

"It is contended by appellees that the intention with which the fixtures were put in place, as shown by the evidence in the case before us, is the chief test as to whether they are removable by the tenant before the expiration of his lease. This is conceded by appellants to be the rule if such fixtures may be removed without injury to the freehold or themselves; but, as we have said, the evidence fails to sustain appellants' claim that their removal would, in this case, necessarily injure the freehold, and authorities above referred to are to the effect that the fact that this removal requires the taking to pieces of a fixture, such as a brick chimney or a brick oven, is not conclusive against the tenant's right. Upon principle, it would seem that the mere fact that its removal may cause some injury to the fixture itself, though not injuring the freehold, ought not to destroy the right. The landlord is not affected by an injury done by the tenant to the latter's own property. It may still be valuable to the tenant, even though he be put to extra expense to repair or rebuild; and if, when the trade fixture was erected, the tenant, by his conduct, manifested the intention to retain ownership and remove it at the end of the lease, it appears that such intention should control even if such removal necessitates a reconstruction of the fixture: Ewell on Fixtures, 96.

³⁶ "Identity is not necessarily lost by demolition. It is said in *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 522, 15 Am. St. Rep. 235, 23 N. E. 327, before referred to: 'The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act.' In this state, the intention so manifested is regarded as the principal test to determine the right of removal. In *Sword v. Low*, 122 Ill. 487, 13 N. E. 826, it is said: 'To determine the irremovable character of a fixture three tests are by the

modern authorities applied, viz.: 1. Actual annexation to the realty or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold.² Here no such intention appears, but the contrary. It is further said in that case: 'It is apparent, from the authorities, that however permanently attached, if removable without material injury, the intention, to be inferred from the circumstances, and the relation of the parties to each other and to the realty, or as shown by the evidence, will be of controlling and decisive importance.' To the same effect are *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. 802; *Hewitt v. General Electric Co.*, 164 Ill. 420, 45 N. E. 725; *Kelly v. Austin*, 46 Ill. 156, 22 Am. Dec. 243.

"In the present case, the fixtures in controversy being so removable and having been erected with that intention, were subject to be taken away by the tenant, unless, as is contended by appellants, the right to removal was lost by acceptance, after the erection of the fixtures, of a new lease, which contains no express reservation of the right to remove. In *Sanitary District of Chicago v. Cook*, 169 Ill. 184, 61 Am. St. Rep. 161, 48 N. E. 461, it is said: 'But the great weight of authority seems to be, that where, at the expiration of a lease during which trade fixtures had been erected on the premises by the tenant, a new lease is taken of the same premises containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises ³⁷ and without recognizing the right to remove them, such fixtures erected under the former lease cannot be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous.' And it is further said: 'The reason given is, because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of this kind without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterward estopped from denying.'

"Applying the foregoing rule to the case at bar, the question we deem it necessary to consider is, whether, in fact or law, the alleged cancellation and surrender of the original lease to McClurg & Aldrich and the execution of a new one

strument to McClurg alone constituted a new lease of the premises, including the fixtures in dispute. It will be noted that this transaction occurred, not at the expiration of the original lease, but during its term, which continued to run on as before. All that was in reality done was just what was intended to be done, viz., to release Aldrich from liability as a lessee thereunder, in accordance with his wish to be relieved because of his retirement from the firm. It appears that upon one copy of the original instrument the appellants wrote the words, 'Canceled December 2, 1891.—D. W. & H. Baker,' and handed said copy to Aldrich, the retiring partner and lessee, but retained in their possession the other copy or duplicate, which was uncanceled and unsurrendered. It is true that a new lease was made out and executed by McClurg alone, but it was for the balance, only, of the same term, at the same rental, payable in monthly installments of the same amount, at the same place, to the same parties. It was but a reiteration of the former lease. It contained, in addition thereto, permission for assignment by McClurg to a corporation—the McClurg Cracker Company—which he seems to have ³⁸ been intending to organize or had organized to take in the business; but this certainly did not make it a new lease. It is evident that there was in this transaction no intention to create any new or different liability on the part of McClurg, the lessee. The purpose, as shown by what was done, was to release Aldrich, and what was done was, in legal effect, no more than if an indorsement had been made on the original instrument to the same effect. We are compelled to the conclusion that the parties did not intend to, and did not in fact, make any new or additional demise or create any new obligation for the tenant, and that the lessee, McClurg, did not intend to, and did not in fact, accept any new obligation—in other words, that the transaction did not amount to a new leasing of the demised premises, and had no effect whatever upon the ownership of the trade fixtures in controversy and the right to their removal.

"The judgment of the circuit court must be affirmed."

An appeal having been taken to the supreme court, it adopted the opinion of the appellate court.

Edward W. Cullen, for the appellants.

Green, Honore & Peters and Peck, Miller & Starr, for the appellees.

40 Per CURIAM. We concur in the views expressed in the foregoing opinion of the branch appellate court, which opinion will be adopted by this court, and the judgment will be affirmed.

On What are Fixtures, as between landlord and tenant, see the monographic notes to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 883-887; *Holmes v. Tremper*, 11 Am. Dec. 241-244. It has been held that a baker's oven, built by a tenant in such a manner that it becomes a fixed and permanent structure, so united with the building that the two are inseparable without the destruction of the one and substantial injury to the other, and so built that when taken down it loses its character as an oven, becoming brick and mortar, except the iron lining and door, is not removable: *Collamore v. Gillis*, 149 Mass. 578, 14 Am. St. Rep. 460, 22 N. E. 46.

VANNATTA v. LINDLEY.

[198 Ill. 40, 64 N. E. 735.]

A FORGED NOTE is Void, Even in the Hands of an Innocent Holder for Value, unless it has been ratified by the payor named on it. (p. 271.)

FORGED NOTE—Jurisdiction of Equity to Cancel.—A suit in equity cannot be maintained to have a forged note declared void and canceled, and to enjoin the holder from entering judgment thereon, where it purports to authorize a confession of judgment in any court of record. The remedy at law is adequate. (p. 271.)

EQUITY PRACTICE in Dismissing a Bill.—Where a bill is dismissed in equity for want of jurisdiction, on the ground that an adequate remedy at law exists, the court should not incorporate in its decree a finding of facts which may have the effect of prejudicing the case if an action should be brought at law. (p. 272.)

Brewer & Strawn and Butters & Carr, for the appellants.

H. M. Steely, J. W. Creekmur, and McDougall & Chapman, for the appellees.

41 WILKIN, J. This is a bill in equity by appellants against appellees to have a promissory note, and power of attorney to confess judgment thereon, decreed null and void and delivered up to be canceled; also to enjoin appellees from entering judgment thereon. Answer was filed denying the allegations of the bill, denying that complainants are without adequate remedy at law, and asking that the same advantage be given the defendants on their answer as they would be entitled to upon a

demurrer to the bill. Replication being filed, the cause was referred to the master to report the evidence, with his conclusions. He found the facts substantially as alleged in the bill—that is, that the note therein described was a forgery and that its execution was obtained by fraud and circumvention. The court sustained objections to so much of his report as found the note to be a forgery, but sustained the finding that its execution was obtained through fraud by the payee. It found, however, that the complainants had a complete and adequate remedy at law and dismissed the bill for want of equity. On appeal to the appellate court for the second district that decree was affirmed, and the present appeal taken.

In the appellate court the appellees assigned cross-errors on the finding of the circuit court, recited in its decree, that the execution of the note was procured by ⁴² fraud and circumvention, which cross-errors were sustained and the cause remanded, with directions to the circuit court to enter a decree dismissing the bill for want of jurisdiction without further recital as to the execution of the note.

The principal question involved in the case is whether the complainants had a complete remedy at law, on the theory of their bill that the note was a forgery or that its execution was obtained by fraud and circumvention. It is well understood that a forged note is by the common law absolutely void, even in the hands of an innocent purchaser for value, unless it has in some way been ratified by the payor named in it, and our statute provides "that if any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid [that is, negotiable instruments], such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument": Hurd's Stats. 1899, c. 98, sec. 10. The defense, therefore, against a forged promissory note, or one the execution of which has been obtained through fraud or circumvention by the payee, is complete and adequate in an action at law: Ehrler v. Braun, 120 Ill. 503, 12 N. E. 996; Easter v. Minard, 26 Ill. 494; Richardson v. Schirtz, 59 Ill. 313; Sims v. Bice, 67 Ill. 88. That equity will not, in such a case, take jurisdiction for the purpose of ordering the surrender or cancellation of a note is also held in Black v. Miller, 173 Ill. 489, 50 N. E. 1009. We have examined the authorities cited by counsel for

appellants as sustaining a contrary doctrine and find them not here in point.

Counsel for appellants seek to distinguish this case from the general rule because there was attached to this instrument a power of attorney authorizing the confession of a judgment in any court of record, in term time or vacation. They say: "The holder of the note was ⁴³ threatening to bring suit in a foreign jurisdiction to make complainants additional expense and to use all legitimate means of collecting the note, which, of course, included a dismissal of the case whenever a defense had been made, and again entering judgment in some other foreign jurisdiction, and so continuing to harass the complainants until in desperation they should pay the note." The facts found by the master in this case do not warrant the assumption. There is nothing whatever, either in the bill or the proofs, to the effect that the holder of the note intended to dismiss any suit brought upon it if resisted, or otherwise harass the appellants. That he had a right to use all legitimate means to collect it cannot be and is not denied. The mere fact that it may be more convenient for parties to maintain an action or make a defense in equity than at law will not justify a resort to the former jurisdiction if the remedy is complete and adequate in the latter. By their answer the defendants below properly raised the question of jurisdiction on the ground that there was a full and complete remedy at law, and we entertain no doubt that the circuit court properly held that it was without jurisdiction. We are also inclined to agree with the appellate court in its conclusion that it was improper for the circuit court to incorporate in its decree a finding of facts which might have the effect of prejudging the case if a suit should be brought upon the note in a court of law, and that the direction to dismiss the bill without any recitation as to its finding of facts as to the execution of the note was proper.

The judgment of the appellate court will accordingly be affirmed.

Cartwright and Boggs, JJ., dissenting.

CANCELLATION OF FORGED INSTRUMENTS.

The rule announced in the principal case, that equity will not entertain jurisdiction to cancel an alleged forged instrument because the remedy is complete and adequate in an action at law, is unsup-

ported by authority. As is well known, among the most ancient and familiar subjects of equity jurisdiction are suits for the cancellation, reformation and rescission of written instruments, and it is generally maintained that an allegation that an instrument is forged is sufficient to confer jurisdiction upon a court of equity to cancel or rescind it, notwithstanding any remedy which the complainant has at law. Thus a court of equity has jurisdiction of a suit for the cancellation of a forged note brought by the purported maker against the payee, who is alleged to be asserting the validity of such note and attempting to negotiate it. The complainant's remedy at law in such case, by defending against the note when sued thereon, is not as practical and efficient as that in equity, and therefore not adequate and complete, so as to exclude the jurisdiction of equity: *Schmidt v. West*, 104 Fed. 272. A person whose name has been forged to a negotiable instrument may maintain a suit in equity against an indorsee of such instrument to compel a cancellation and surrender thereof, or a release from liability thereon. In such action the court may render a decree releasing the person whose name is forged from all liability, and, as to him, declaring the instrument null and void: *Huston v. Roosa*, 43 Ind. 517. This case was followed as to the above ruling, in all respects, in *Huston v. Schindler*, 46 Ind. 38, and in *Hardy v. Brier*, 91 Ind. 91-93, where the court added that "the right to cancel forged instruments has been fully recognized as belonging to the jurisdiction of courts and chancery. The mere right of a defense at law, when it may suit the pleasure of the holder of a forged note to bring suit, cannot be considered as an adequate remedy." A person whose name has been forged, or affixed to a bond without his authority, may maintain a bill in equity for an injunction, and to have the bond canceled, so far as it purports to bind him: *Patterson v. Smith*, 4 Dana, 153. In delivering the opinion in this case the court said: "As no suit had ever been brought or judgment rendered on the replevin bond, a bill quia timet for an injunction and cancellation of the bond, so far as it purported to be an obligation of Patterson, might be sustained on the ground of fraud, and of a right in equity to prevention and security. It is true that he might have a legal remedy, in the nature of a writ of error coram vobis, but such a remedy cannot be exclusive; besides, the person whose name has been forged may not be apprised of the fact until such a proceeding shall have been barred, or until he may have lost his proof. Hence, a bill quia timet is a concurrent and more efficient remedy, and especially, also, as by such a proceeding the complaining party may obtain a decree, not only for his exoneration, but also for the cancellation of the bond as to himself, so that it can never afterward be used against him anywhere, at any time, or for any purpose": *Patterson v. Smith*, 4 Dana, 153. In *Huston v. Roosa*, 43 Ind. 517, where a bill was sustained to cancel a negotiable note on the ground that it was forged,

the court said: "This, it will be seen, is not a case in which the illegality of the instrument appears upon its face, but depends upon the extrinsic fact that plaintiff's name attached to it as maker was a forgery. Hence the question does not arise whether a court of equity will interfere in a case where the instrument appears to be void upon its face. The cancellation of written instruments in proper cases is one of the familiar heads of equity jurisdiction. The abolition, in practice, of the distinction between law and equity does not seem to affect the question arising here. Our courts administer, in every case, either law or equity, in accordance with the legal or equitable rights of the parties. If, according to the principles governing a court of equity, the judgment below is right, it must be affirmed": *Huston v. Roosa*, 43 Ind. 519.

The rule governing forged negotiable instruments has been applied to other forged instruments as well. Thus in *Sharon v. Hill*, 20 Fed. 1, it was held that courts of equity may inquire into and cancel a forged instrument of writing claimed to be a marriage contract before it is sought to be put into effect, in order to disarm the forger of a dangerous power that might be thereafter exerted to the detriment of innocent parties. The court said that "the whole doctrine of courts of equity on this subject is referable to the general jurisdiction which it exercises in favor of a party quia timet. It is not confined to cases where the instrument, having been executed, is void upon grounds of law and equity, but it is applied even in cases of forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery: *Sharon v. Hill*, 20 Fed. 3. The cases are quite frequent where courts of equity entertain bills to cancel forged deeds as clouds on title. The jurisdiction of the court in such cases is never questioned: *Maclellan v. Seim*, 57 Kan. 471, 46 Pac. 959; *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. 291; *Swihart v. Harless*, 93 Wis. 211, 67 N. W. 413. In *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. 291, it was said that "no question was raised as to the right of a court of equity to grant relief in such cases by ordering the instrument to be delivered up and canceled; for, although the plaintiff might have brought an action of ejectment, yet such remedy would not have been adequate and complete, since the existence of the deed in an uncanceled state would necessarily have a tendency to throw a cloud over the title. Therefore, a bill is maintainable in a court of equity for the cancellation, as a cloud on the title of a forged deed which upon the strength of a false certificate of acknowledgment, made by an officer duly authorized, has been put on record. The fact of the forgery is an extrinsic fact, depending upon parol evidence, and the grantee in the deed, in making the title thereunder, would not be bound to prove the genuineness of the signature of the grantor, but could repose on the statutory presumption arising from its certificate of acknowl-

edgment, and this circumstance, independently of any other consideration, gives the court jurisdiction."

A suit in equity to annul a forged deed and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, while he is out of possession, is not taken out of equitable jurisdiction by the fact that the deed is void. Such a suit is one peculiarly of equitable cognizance, and it is not necessary before bringing such suit that the legal owner should establish his title, and obtain possession of the land, by ejectment at law: *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2133. This latter case was followed in *Hoopes v. Deraughn*, 43 W. Va. 447, 27 S. E. 251. where it is said that "a suit in equity to annul a forged deed of land, and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, or the party holding title from such grantor, who institutes a suit to annul such forged deed while he is out of possession, is not taken out of equitable jurisdiction by the fact that the deed is void. It is not necessary, before bringing such suit, that the legal owner should establish his title and obtain possession of the land by ejectment at law." So in New York the rule prevails that a suit is maintainable in equity for the cancellation, as a cloud on the title, of a forged deed which, upon the strength of a false certificate of acknowledgment, made by a duly authorized officer, has been put upon record: *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474. In a prior case (*Bushnell v. Harford*, 4 John. Ch. 301, 302), "the chancellor thought it too clear a case to need discussion, and directed that the deed, which was in court, should be canceled, as being a fraudulent, forged and void deed, and that the defendants, and all persons claiming under them, should be perpetually enjoined from using the record of the deed as evidence of title."

In a case in Massachusetts (*Boardman v. Jackson*, 119 Mass. 161), it was held, however, that if a person forges a deed to land to himself with the knowledge and consent of the owner of such land, and fraudulently procures an acknowledgment of the deed by a third person, and then leases and subsequently sells the land, the owner has a plain, adequate and complete remedy at law, and cannot maintain a suit in equity against the person executing the deed, the assignee of the lessee and the purchaser, to cancel such deed and lease.

VILLAGE OF PARK RIDGE v. ROBINSON.

[198 Ill. 571, 65 N. E. 104.]

MUNICIPALITY—Contract with Exempting Itself from Liability, Where There is No Other Remedy for the Other Contracting Party.—If a municipal corporation in contracting for the construction of sidewalks provides that payment therefor shall be made only out of special taxes, and that the contractor takes all risks of the invalidity of such taxes and of the proceedings therein, and agrees to make no claim against the municipality in any event, he cannot maintain an action against it on the ground that the ordinance and proceedings for the levying of such taxes were irregular and void, and that the municipality had power to provide for payment out of its general revenues. (p. 281.)

MUNICIPALITY—Power of to Limit Its Liability Under Contract.—A municipal corporation contracting for the building of sidewalks has an implied power to limit its liability, by providing that the contractor shall resort to a special tax or fund only, and that he takes the risk of the validity of such tax. (p. 283.)

Assumpsit against the village of Park Ridge to recover a balance claimed to be due the plaintiff for the construction of sidewalks. The work had been done under an ordinance which, among other things, provided:

“Sec. 3. All owners of lots or parcels of land aforesaid are hereby required to construct said sidewalk in front of their lots or parcels of land within ten days after the date of publication of this ordinance, and in default thereof such sidewalk shall be constructed and laid by the village.

“Sec. 4. Said street commissioner shall certify to a bill of the cost of said sidewalk, showing in separate items the cost of grading, materials, laying down and supervision, and file it in the office of the village clerk, together with a list of the lots and parcels touching upon the line of the sidewalk, and the names of the owners thereof, and the frontage on said sidewalk.

“Sec. 5. The village collector is hereby designated the officer to collect the special tax herein provided, and to whom warrants for the same shall be directed.

“Sec. 6. The village clerk shall comply with the provisions of the act to provide additional means for the construction of sidewalks in cities, towns, and villages, in force July 1, 1875, and if any lands or lots is delinquent after return of warrant by said village collector, then said village clerk shall make a report of said delinquent special tax, in writing, to the

county treasurer, ex-officio collector, prior to March, 1894, as required by the act."

The plaintiff Robinson having made a bid, which was accepted, a contract was entered into reciting the ordinance in full and containing these, among other, provisions:

"The village of Park Ridge covenants to pay to the first party when the contract shall be wholly carried out and the work shall have been accepted by the president and board, and when and as the special tax or taxes levied or to be levied for the same shall be collected, the sum or sums stated in the bids of the first party for doing the work, on file in the office of the village clerk, copies of which are made a part of this contract; that from time to time interest-bearing warrants drawn against and payable out of said special tax or taxes, to be of the usual form of such warrants and to bear interest from date at the rate of six per cent per annum until paid, may be issued to said party of the first part upon estimates to be made by the inspector or such other person as may be appointed by said president and board of trustees, said warrants to be negotiable in terms. . . .

"So far as money shall at the time of the issuance of such estimates be collected upon a special tax or taxes for said work and applicable to the payment of such estimates, such money shall be applied to the payment of such estimates, and for the balance for which no collections are available, the interest-bearing warrants above provided for may be drawn and issued. . . .

"In case the village should become the purchaser of any special tax certificates, such purchase shall not be deemed a collection of such special tax, and no act shall be construed as a collection until the money due has been actually paid into the village treasury. . . .

"No estimate will be issued to the contractor until all claims for labor and material have been satisfied, said sum of money being payable out of the proceeds of any special tax which shall hereafter be levied for the said improvements, the said party of the first part agreeing hereby to make no claim against said village in any event, except from the collections from the special taxes made or to be made for the said improvements, and to take all risks of the invalidity of said special tax, or any of them, or of the proceedings therein, or for failure to collect the same, and to make no claim against said village, in any event, by reason of any suit or

proceedings which may be instituted against said village or any of its officers, preventing or retarding the prosecution of the work.

"If the progress of the work is satisfactory to the president and board and all claims for labor and material are satisfied, then every two weeks estimates will be issued up to eighty-five per cent of the value of the work, and estimates for the remaining fifteen per cent only on final completion and acceptance. It is understood that any excess of the special taxes levied for said improvement over and above the actual cost shall be reserved by the village, so that it may be rebated to property owners when the cost is known, and that said estimates will accordingly be paid fully only when the tax levied for the improvement shall be wholly collected, so that the payments made on vouchers and estimates prior to the full collection of taxes, together with the amount of excess of taxes to be rebated to property owners, shall not exceed the full amount of cash collections in the treasury of said village to the credit of said tax fund."

After the completion of the work, eleven warrants were issued in favor of the plaintiff, on which six hundred and forty-seven dollars and sixteen cents were collected and paid to him, but on his attempting to collect of the remaining property owners, the county court held the ordinance void. Thereafter the village enacted another ordinance purporting to amend the first and to ratify the special assessment, but this also was held void.

The plaintiff requested the trial court to hold that the original ordinance was void and incapable of amendment, and that assumpsit would therefore lie against the village for the work done, but the court refused to so rule, and, on the contrary, at the request of the defendant, held that the plaintiff was not entitled to recover, though it further held, at his request, that there was nothing in the constitution or statutes of the state to prevent the village from paying for the construction of the sidewalks out of some other fund than that to be derived from the collection of the special taxes. The plaintiff appealed to the appellate court for the first district, which reversed the judgment of the trial court, and the defendant thereupon appealed to the supreme court.

Black & Black and Joseph A. Phelps, for the appellant.

Charles H. Baldin, for the appellee.

579 CARTER, J. There was no dispute as to the amount the plaintiff was entitled to recover, if he was entitled to recover at all, and the question is presented here as one of law whether the trial court erred in refusing to hold as law in the decision of the case the first proposition submitted by the plaintiff and in holding the first proposition submitted by the defendant. These propositions served the same purpose as instructions of similar purport to the jury would have served in directing a verdict had the cause been tried by a jury. The appellate court made no finding of facts, and evidently found the facts the same way as the superior court found them, but was of a different opinion as to the legal effect of such facts, and therefore reversed the judgment and rendered judgment 580 for the plaintiff, which was the proper action to take if the judgment of the superior court was erroneous.

From the facts as settled, it appears that no fraud or imposition was practiced upon the plaintiff in any manner, but that the village authorities acted in good faith and without any negligence, and did not promise or agree to exercise any power they did not possess or to do anything they had no power to do; that the ordinance was incorporated in full in the contract, and that the plaintiff entered into said contract to construct the sidewalks with as full knowledge of all of the facts involving the validity of the ordinance, and of the contract itself, as the village authorities possessed. It must also be assumed from the finding, as a settled fact, that after the first ordinance was passed and the contract entered into the village used due diligence to collect the cost of the work from the lot owners, and stood ready and willing at all times, and so notified the plaintiff, to use any and all lawful means in its power, and to proceed in any proper way the plaintiff might advise or suggest, to collect from the lot owners such cost, and to pay the same, when collected, over to the plaintiff. The ground upon which the plaintiff contends, and the appellate court held, the village is liable, is this, as we understand it: That the village had the power to contract for the building of the sidewalks in question and to pay for the same out of its general revenues, and the ordinance purporting to authorize their construction and payment therefor by special taxation being void, the sidewalks were in reality constructed by the plaintiff, at the request of the village, without any ordinance, and the village, having accepted and received the

benefit of plaintiff's work and materials, must be held liable to pay for the same, as fully as if it had undertaken in the first place to do so, out of its general revenues. It is said further in support of the plaintiff's view, that where a private corporation has received money or other thing of value under ⁵⁸¹ a contract which is ultra vires, and which it refuses to perform on that ground, an implied contract arises to refund or to pay for what it has received on the nonenforceable contract, and that municipal corporations should be, and have been, held to the same liability.

We have no doubt that the ordinance was wholly void because it did not provide, in terms or by reasonable intendment, in the manner provided by the act of 1875, that the cost of the work should be paid from special taxes levied or to be levied on the lots touching upon the line of such sidewalks, in any one of the methods provided by the said act—that is, according to frontage or superficial area, or to value ascertained as the statute provided; and because the ordinance required the owners of such lots to construct the sidewalk in front of their respective lots within ten days, instead of thirty days allowed by the statute, after publication of the ordinance. But without considering the soundness of the doctrine asserted or the extent of its application, no reason is presented, and we know of none, why this asserted liability is of so peculiar a character as that it may not be contracted against. It is not claimed that such a contract of a municipal corporation protecting its general revenues, and guarding against a liability which it might be wholly unable to meet and which it would not voluntarily incur, would be against public policy, and it is difficult to understand upon what ground such a contract, fairly entered into, can be declared void by the courts or inoperative for any reason. It would seem that the only question ought to be, What is the meaning of the contract? As we have seen, the one in question in this case expressly and in the plainest and most unequivocal language protected and guarded the village against any general liability whatever to pay for the work out of its general revenues—against the very liability now asserted and by this suit sought to be enforced by the same party who knowingly and voluntarily entered into and ⁵⁸² executed the contract on his part. By the contract, the village only covenanted to pay when and as the special taxes levied for the same should be collected. It provided for the issuing to the contractor of interest-bearing

warrants payable out of such taxes. It provided that no purchase of the property or other act of the village should be construed as a collection until the special tax should be paid into the village treasury. By the contract, the plaintiff expressly agreed "to make no claim against said village in any event, except from the collections from the special taxes made or to be made for the said improvements, and to take all risks of the invalidity of said special tax, or any of them, or of the proceedings therein, or for failure to collect the same." And in the vouchers or warrants issued to the plaintiff, and which he also signed and accepted, he agreed that in consideration of the issuing of the same to him he accepted them in full payment of the amount stated in them, and relinquished any and all claims which he might have against the village for the work mentioned, and for the payment of the vouchers except from the installment of the special tax therein mentioned.

It cannot be assumed that the village would have entered into the contract or would have ordered the walks to be constructed without thus limiting its liability. On the other hand, it should be presumed from the facts found that it would not have authorized the work and incurred the indebtedness except upon the terms of the contract which it made with the plaintiff. No reason whatever is assigned why the plaintiff is not bound by this contract, except the one that the ordinance under which the work was done was invalid. But the law charges him with the same knowledge of the invalidity of the ordinance as it attributes to the village trustees, and if he was desirous enough to obtain the contract to agree to take all risks of the invalidity of the ordinance and of the special tax and of the proceedings to collect the same, no reason is perceived ⁵⁸³ why he should not be bound by his agreement. Presumably, contractors often obtain higher prices for their work because of the assumption of such risks, and that not infrequently they obtain full satisfaction for their contractual demands under invalid ordinances because they are not contested. But be that as it may, it would be a dangerous doctrine to establish, that where there is no fraud, no concealment, no negligence and no wrongful act of any kind on the part of the municipal corporation affecting the rights of the other party to the contract, such other party may avoid his contract on the sole ground of the invalidity of the ordinance under which the work is done, notwithstanding he expressly assumed all risk of the invalidity of such or-

dinance and agreed not to make the very claim which by his suit he undertakes to assert. Courts have no power to make contracts for parties, or to unmake them, except upon well-established grounds, and although upon principles of natural justice municipal corporations, like individuals, ought to pay for what they receive, they cannot be held bound to do so when the claimants have expressly contracted that they shall not be so bound. If it be said that there was no consideration for such an agreement on the part of plaintiff, it is a sufficient answer to say that the undertaking of the village to do what it in fact did do was a sufficient consideration. But even if there was no consideration and the plaintiff had agreed to do the work without compensation and to make a gift of the same to the village, and although the contract, while it remained executory, could not be enforced, yet after it had been fully performed by plaintiff, he could not avoid it and recover the value of his work on the plea of no consideration.

It is contended, however, that this court has decided that the contractor can recover in such a case as this, and reference is made to *Maher v. City of Chicago*, 38 Ill. 266, and *City of Chicago v. People*, 56 Ill. 327; and *City of East St. Louis v. East St. Louis Gaslight etc. Co.*, 98 Ill. 584 415, 33 Am. Rep. 97, and *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76, are also cited as supporting the doctrine announced in the two first-mentioned cases. In the *Maher* case the city, in its contract with the claimant, assumed a power which it did not possess, and the ordinance was held void for lack of power under its charter to adopt it. In the second case, as we said in *Foster v. City of Alton*, 173 Ill. 591, 51 N. E. 77, "the property other than that of the North Chicago Railway Company had already been assessed and had paid the full amount of benefits realized, and the city had made a contract with the railway company by which its property was exempted from assessment. The contractor had done the work in ignorance of the agreement for exemption, and had been induced to accept a contract for payment out of an assessment which the city had agreed not to make but to exempt the property from." Neither of these cases is like the one at bar in respect of the facts, though there are some expressions in the opinions lending support to the plaintiff's view. The village did not, in the case at bar, assume to have a power which it did not possess, and procure money, work or other thing of value from the plaintiff upon the strength

of any such assumption, as appears to have been done in the Maher case. Nor did it obtain from the plaintiff his labor and materials by concealing from him any facts within its knowledge affecting his rights, as was done in the second case cited. As a general rule, it will be found that in the cases in which the municipal corporation has been held to a general liability, there has been some wrongful act, negligence or default on its part which injuriously affected the rights of the claimant. But there is no such element in this case.

Something is said in the argument to the effect that the village had no power to make the contract as made, limiting its general liability—in other words, that, like the city of Chicago did in the case of *City of Chicago v. People*, 56 Ill. 327, it assumed a power it did not possess and agreed to do what ⁵⁸⁵ it had no power to do under its charter. We need not determine, under the law as it now is, what the effect of such an assumption of authority would be on the rights of the parties, for it is sufficient to say that the village did have the power to make and enter into the contract as it was made. True, as pointed out, the act of 1875 makes no express provision for limiting the liability of the corporation to payment out of the special fund, as made by section 49 of article 9, and by section 74 of the act concerning local improvements; but whether either of these provisions is applicable to the contract in question or not, we have no doubt that the corporation has the corporate power to limit its liability, by contract, to pay only out of the fund which the statute authorizes it to raise for such payment. Such a power, whether expressly given or not, is necessary to other powers expressly granted, and will be implied.

The views we have expressed find some support in *People v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33; *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238; *Hunt v. City of Utica*, 23 Barb. 360 (same case in the court of appeals, 18 N. Y. 462); *Fletcher v. City of Oshkosh*, 18 Wis. 228; *Clark v. White*, 59 Ind. 435; *Arment v. Yamhill County*, 28 Or. 474, 43 Pac. 653; *Jacks v. Phillips County*, 25 Ark. 64; *Congdon v. Chapman*, 63 Cal. 357; *Chambers v. James*, 4 Pa. St. 39; *Lyman v. Northern Pacific Elevator Co.*, 62 Fed. 891; *City of Pontiac v. Talbot Paving Co.*, 94 Fed. 65; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73. See, also, *Farrell v. City of Chicago*, 198 Ill. 558, 65 N. E. 103, and cases cited.

We are of the opinion that the superior court decided cor-

rectly in holding the defendant's first proposition, and in refusing to hold the plaintiff's first proposition as law in the decision of the case and in rendering the judgment it did render, and that the appellate court erred in reversing that judgment and in rendering judgment of its own for the plaintiff. The judgment of the appellate court will therefore be reversed and the judgment of the superior court will be affirmed.

A City has no Power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for five years: Portland v. Bituminous Pav. Co., 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28. But see Wilson v. Trenton, 61 N. J. L. 599, 68 Am. St. Rep. 714, 40 Atl. 575.

MIDDEKE v. BALDER.

[198 Ill. 590, 64 N. E. 1002.]

PRESUMPTION OF SURVIVORSHIP.—When two or more persons lose their lives in a common disaster, there is not, at the common law, any presumption of survivorship whatever, and if survivorship is claimed it must be proved, and the one having the burden of proof must fail if he cannot prove it. (p. 285.)

SURVIVORSHIP When Several Persons Perish in a Common Disaster.—Where several persons perish in a common disaster, and there is no evidence tending to show who died first, all are treated as having died at the same instant, and no one of them takes from any of the others by reason of the other's death. (p. 285.)

BENEFICIAL ASSOCIATIONS.—The interest of the beneficiary of a certificate in a fraternal beneficial association is not a vested interest. (p. 291.)

BENEFICIAL ASSOCIATIONS—Effect of a Member and the Beneficiary Dying in a Common Disaster, or at the Same Time.—If a certificate of a beneficial association provides that the amount designated therein shall be paid to the beneficiary in the event of her dying before the member, otherwise to his heirs, and the member and the beneficiary perish in a common disaster, the effect is the same as if there was proof that she died first, and the heirs at law of the member are entitled to recover the amount provided to be paid by the certificate. (p. 291.)

Interpleader by the National Union, a fraternal beneficiary association, against the heirs at law of F. H. Marty, deceased, and also against the administrator and heirs at law of his wife, to determine to whom should be paid the amount of the certificate issued to Marty by the association, which provided that such amount should be paid to his wife if she survived

him, otherwise to his heirs at law. He, his wife, and their infant child all perished in a fire which consumed their home in February, 1899, and there was no evidence tending to show which survived.

The trial court decreed the fund to the administrator of the wife, but this decree was, on appeal to the appellate court, reversed, and the cause remanded. Thereafter the trial court entered a decree in favor of the heirs at law of Marty, and the administrator and heirs of the wife appealed, but the decree was affirmed by the appellate court, and from this affirmation they appealed to the supreme court.

George F. Ort and Samuel J. Howe, for the appellants.

Thomas H. Joyce, Dent & Whitman, and W. O. Lindley, for the appellees.

594 CARTER, J. When two or more persons lose their lives in a common disaster, by the civil law a number of presumptions of survivorship arise, based on age, sex and condition of health, but there is no presumption that they all died simultaneously. At common law there is no presumption of survivorship, and if survivorship is claimed it must be proved, and the one having the burden of proof of such survivorship must fail if he cannot prove it. While there is no such presumption, the practical result of this rule is that the parties are treated as having all died at the same instant of time, and that no one of those thus dying synchronously takes from any of the others dying in the common disaster, by reason of the other's death. This rule was practically settled in England in 1855, in the leading case of *Underwood v. Wing*, 4 De Gex, M. & G. 633, heard on appeal from the master of the rolls: *Underwood v. Wing*, 19 Beav. 459. All the previous cases and authorities were cited and the subject was thoroughly discussed. Underwood his wife and three children all perished at sea on the voyage from London to Australia. The lord chancellor said: "The question in the present case is, whether the plaintiff [one Underwood] being the next of kin, or representing the next of kin, Mr. Wing shows a title depriving her of that to which, in the absence of a valid will, she is entitled. That depends, first of all, on the terms of the will, and the will gives the property to Mr. Wing 'in case my wife shall die in my lifetime.' Then comes the question, On whom does the burden of proof rest to show whether the wife did

or did not die in the testator's lifetime? I think, the principle ⁵⁹⁵ once being admitted that the prima facie title is in the next of kin, that it must rest on the person who claims the property under a bequest giving it to him in that particular event. It is not for the next of kin to show that the wife did not die in her husband's lifetime, but the person who claims under the disposition must show, not that probably it might be one way or the other, but that that state of circumstances did in fact occur which entitles him, according to the language of the will, to say that the wife did die in her husband's lifetime. . . . The result, therefore, is that, there being a will giving away the property in one state of circumstances—namely, that the wife die in the husband's lifetime—and it not being proved that that state of circumstances existed, the property is not given away at all, and must be distributed among the next of kin as upon an intestacy." And it was also said that there being no proof as to which one, husband or wife, survived the other, "the property must be distributed just as it would have been if they had both died at the same moment." The case went to the house of lords as *Wing v. Angrave*, 8 H. L. Cas. 183, and the same rules as to survivorship and burden of proof were there announced.

This subject has been considered by a number of our American courts, and all are agreed that there is no presumption of survivorship and that survivorship must be proved. In considering the question upon which the decision of the case at bar must turn, a review of the principal cases may not be unprofitable.

In *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 523, the father, his only daughter, her husband and their only child, perished at sea on a voyage from Charleston to Baltimore. The contest was between the heirs of the daughter and the heirs of the father. Speaking of the question of survivorship as between the father and the daughter, the court said: "For aught that appears in the present aspect of the case they may both have perished ⁵⁹⁶ together. This being so, and no arbitrary presumption being authorized by law in such cases, arising from age or sex, the consequence is that those who seek to enforce their rights as heirs at law of Caroline E. Coye [the daughter] must fail in establishing their right to a distributive share in the estate of Sylvanus Keith," the father.

In the case of *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424, there was a will devising property to trustees on certain

trusts for the benefit of the husband and two children of testatrix for life, and in the event of their death without further disposition of the property, to certain named relatives of the wife. The husband of the testatrix, her mother and her two children were all lost on a voyage from New York to Europe, in 1875. The contention was between the heirs of the children and the relatives of the testatrix named in the will. The doctrine of the English court in the Underwood case was approved, and it was held that the persons who claim through a survivorship must prove the same. After quoting some expressions in the older English cases the court said: "These expressions only mean that as the fact [of survivorship] is incapable of proof, the one upon whom the onus lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property."

In *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132, A. W. Nickerson, his wife and his three children sailed from Scotland for Havana and were never heard from again. His mother had died some years before, leaving him and his two sisters as her only heirs at law. The contest was between the grantee of the father and the two sisters. The court said: "In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment—not because the fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory. . . . The children are not ⁵⁹⁷ proved to have survived their father, and therefore he died without issue and his share descended to his father"—citing the three cases quoted above.

In *Russell v. Hallett*, 23 Kan. 276, the court said, citing with approval *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 523, and *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424: "In the absence of other evidence the fact as to who was the survivor where several persons perish in the same catastrophe is assumed to be unascertainable, and property rights are disposed of as if death occurred to all at the same time. While, therefore, it is correct to say the law makes no presumption on the subject, the practical consequence is nearly the same as if the law presumed all to have perished at the same moment."

In *In re Ehle's Estate*, 73 Wis. 445, 41 N. W. 627, Abram Ehle, his son James, the son's wife and their three children, all perished in the same fire. The court found, from the evidence, that Abram died first, then his son James, and lastly,

the wife and children. In speaking of the question of survivorship the court said: "In the absence of any such evidence, the question of such survivorship must necessarily be regarded as unascertainable, and hence in such case the rights of property must be determined as if death occurred to all at the same moment of time."

In the case of *Petition of Willbor*, 20 R. I. 126, 78 Am. St. Rep. 843, 37 Atl. 634, the three Willbor sisters were burned to death at the same time in their house at Newport. Each one left a will leaving her property to the others. The court said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment": 51 L. R. A. 863, and note.

There are also several cases involving the right to the proceeds of a policy of insurance upon the life of the husband for the benefit of the wife, where both perished ⁵⁹⁸ in the same disaster, and the contest was between the administrator of the wife's estate and those claiming through the husband, or as substituted beneficiaries. The same rules have been adhered to as in the foregoing cases, and the question as to what party has the burden of proof has been determined by the doctrine of each particular court, whether the beneficiary took a vested or a contingent interest in the fund.

In *Fuller v. Linzee*, 135 Mass. 468, the contest was between the next of kin of Mrs. Fuller and the administrator of her husband, who also represented his next of kin. N. G. Fuller, his wife and their five children sailed from Calcutta for New York and all perished together at sea. Fuller's life was insured, the insurance payable to his wife, and if she predeceased him, then it was payable to their children. The court construed the insurance contract as giving to the wife an interest contingent upon her surviving her husband, and said: "This is a proceeding to establish a right in the wife which would descend upon her next of kin, and the burden of proof is upon the party who undertakes to establish it. We think, upon the view of the contract already taken, that the wife had no interest transmissible to the next of kin unless she survived her husband, and that they cannot maintain this claim without proof that she survived him." A different view has been

taken where it is held that the beneficiary in the policy has a vested interest in it.

The case of *Paden v. Briscoe*, 81 Tex. 563, 17 S. W. 42, was a suit upon a benefit certificate issued by the Supreme Lodge Knights and Ladies of Honor to John F. Briscoe, payable to his wife on his death. The by-laws provided that if the beneficiary should die before the member, the proceeds of the certificate should be paid to the dependent heirs of the deceased. Both husband and wife perished in a fire which consumed the hotel in which they were stopping. The trial court found that both died at the same instant of time, and gave judgment for the mother ⁵⁹⁹ and sister of the deceased, dependents upon him for support, and against the administrator of the estate of the wife. On a review of the case the supreme court said: "The court below finds that the wife, the beneficiary named by the husband, did not die before her husband, but died at the same instant. The result of this finding is that the beneficiary named, at the time the policy was earned by the death of the husband, did not survive him and was incapable of taking the proceeds of the policy. . . . The instantaneous death of both husband and wife as successfully accomplished the inability of the wife to take as if she had died before."

In *Hildebrandt v. Ames*, 66 S. W. 128, which was a suit on an insurance policy, both husband and wife being drowned in the Galveston disaster, the court of civil appeals of Texas said: "There being no presumption either of survivorship or of simultaneous death, and no evidence in the case to sustain a finding of either of these facts, it is manifest that the party upon whom lay the burden to establish such survivorship or simultaneous death has failed to make out his case, and the only question for us to determine is upon which of the parties to this suit such burden was imposed. The determination of this question is not affected by the position of the parties as plaintiff or defendant in the court below." After an extended discussion the court found that the beneficiary had no vested interest in the policy, and held "that it devolved upon her [the beneficiary's] representatives to show that the contingency had happened which would entitle her to receive the proceeds of the policy."

In the recent case of *United States Casualty Co. v. Kacer*, 169 Mo. 301, post, page 641, 69 S. W. 370, Yocum and his daughter perished by the destruction of their yacht on a trip in the Gulf of Mexico. Yocum carried two accident insurance poli-

cies payable to his daughter, if surviving; if not, to his legal representatives. In discussing the case the court fully approved of the rules regarding survivorship and burden ⁶⁰⁰ of proof as stated in the cases, and said: "The rule is, that he who claims a right by virtue of survivorship must prove the fact of the survival of him through whom he claims, and that, failing in this, the property or fund remains vested as it was before the calamity. . . . But this does not settle the case, because the representatives of the father and daughter each claim that the rights of the other depend upon their showing which of the two survived the other, and hence each claims the burden of proof is upon the other. The representative of the father further claims that if neither can prove what the fact in this regard was, then the doctrine of 'distribution' applies, and the fund must go where it would have gone if there had been no appointed beneficiary in the policy, to wit, to the representatives of the assured." The court held that an insurance policy of the kind sued on conferred a vested interest in the beneficiary, and hence gave judgment for the administrator of the daughter's estate.

A different view of the question was taken in *Cowman v. Rogers*, 73 Md. 406, 21 Atl. 64. In that case Walter E. Hoopes, his wife and two children, were all drowned in the Johnstown disaster, in Pennsylvania, in 1889. He was insured in the Order of the Golden Chain, and the certificate was payable, upon his death, to his wife. A sister of the deceased and the administrator of the wife both claimed the fund. The court said: "Mrs. Hoopes was the beneficiary named in the certificate. Her representative has a prima facie title to the funds. That title can only be divested by evidence showing that she died before her husband. They are both dead and both died in the same disaster. There is no proof, and there is no legal presumption, as to which one died first or as to their having died simultaneously. Until it is shown that she died before her husband the fund is payable to no one else other than her representative, because it is only in the event of the death of the nominated beneficiary in the lifetime of the assured that others can possibly take. Until proof ⁶⁰¹ of her having so died is first furnished, her prima facie title cannot be displaced."

Just what the court meant by the expression "prima facie title" is not clear. If the court meant to say that the beneficiary of a certificate in the case of fraternal beneficiary associations

has a vested interest, such is not the commonly accepted view, and is not the law of this state: *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543. In cases of ordinary property no one has a vested interest in it during the lifetime of the absolute owner, but has only an expectancy, dependent upon the death of the owner during the life of the expectant, and upon the further contingency that the owner does not dispose of the property by deed, gift or will made before his death.

The case of a beneficiary in a certificate of a fraternal beneficiary association is analogous. The member of the beneficiary association procuring the beneficiary certificate is the moving party through whose action the beneficial scheme of the association is put in operation for the benefit of the nominated beneficiary, and it is under control of the member, at least to such an extent that he can defeat the expectancy of the beneficiary and secure the benefit of the scheme to some other eligible beneficiary. The object of the insured is to provide for the support of those dependent on or related to him, usually by the ties of consanguinity. Such dependents and relations are the ones entitled to the benefit of the insurance, and the burden of proof rests upon the heirs of the beneficiary—upon those claiming the benefits of the joint action of the insured and the beneficiary association, through the nominated beneficiary—that such beneficiary actually became entitled to such benefit by surviving the insured, and if they cannot do this the benefits will accrue to the succeeding surviving beneficiaries, as may be provided in the scheme of the association, or to the next of kin of the deceased member. In ⁶⁰² the case at bar the laws of the association provided that the benefit should, in case of the death of the beneficiary before the insured, be paid to the heirs of such insured member. These are the appellees, Rose Balder and Bertha Marty. Treating the case as if the member and the beneficiary died at the same time, the result is the same as if the beneficiary died first.

It is contended by appellants that there is no proof appellees are the only heirs of F. H. Marty. Such heirship was alleged in the bill of interpleader and claimed in the answer of appellees, but is denied in the answer of appellants. The circuit court, in the decree, found that appellees were the only heirs at law of the deceased member, and we are of the opinion that this finding is supported by the certificate of evidence.

The judgment of the appellate court must be affirmed.

If Two Persons Perish in a Common Disaster, the question of survivorship, in the absence of evidence, is assumed to be unascertainable, and property rights are disposed of as if the deaths occurred at the same time: See *Petition of Willbor*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634; monographic note to *Coye v. Leach*, 41 Am. Dec. 524, 526.

The Beneficiary in a Benefit Certificate of life insurance has no vested interest or property right therein during the life of the insured: *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263, 61 N. E. 127; *Schmidt v. Northern Life Assn.*, 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800; *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563; monographic note to *Strauss v. Mutual etc. Assn.*, 83 Am. St. Rep. 718. Compare *Jackson Bank v. Williams*, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965; *Pittinger v. Pittinger*, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. REED.

[158 Ind. 25, 62 N. E. 488.]

FELLOW-SERVANTS.—The Common-law Rule that a master is not liable to his servant for an injury sustained through the negligence of a fellow-servant is presumed to prevail in a sister state. (p. 295.)

CONFLICT OF LAW.—If an Injury to a Servant is not actionable in the state where committed, no cause of action can be carried to and asserted in another state. (p. 295.)

FELLOW-SERVANTS.—A Statute Creating a Liability against a master for injuries to his servant through the negligence of a fellow-servant has no extraterritorial effect to give a right of action for an injury received in a sister state. (p. 297.)

CONSTITUTIONAL LAW—Vested Right to Defense.—A statute providing that, in an action against a railroad company for injuries sustained by an employé in another state, it shall not be competent for the company to plead or prove the statutes or decisions of the latter state as a defense, is unconstitutional. (p. 298.)

CONSTITUTIONAL LAW.—A Vested Right of Defense, as well as a vested right of action, is, in a sense, property, and is protected from being taken away by the legislature. (p. 298.)

W. R. Gardiner, C. G. Gardiner and E. W. Strong, for the appellant.

C. K. Tharp, J. A. Padgett and A. J. Padgett, for the appellee.

²⁶ JORDAN, C. J. This action was commenced by appellee in the Daviess circuit court to recover damages for personal injuries sustained. The cause was thereafter venued to the

Pike circuit court, where a trial by jury resulted in a verdict awarding appellee fifteen thousand dollars; and, over appellant's motion for a new trial, judgment was rendered thereon against the railway company. From this judgment the company appeals and assigns as error: 1. That the court erred in overruling its demurrer to the complaint; 2. In sustaining the demurrer of appellee to the second paragraph of answer; 3. In denying a motion for a new trial.

Under the averments of the complaint, the following facts are shown: The defendant, appellant herein, is a railroad corporation owning and operating a continuous railroad which extends from the city of East St. Louis in the State of Illinois, into and through Daviess county in the State of Indiana, on to the city of Cincinnati in the state of Ohio. The plaintiff was, at the time of the accident, and at the time he instituted his action, a resident of the state of Indiana. On June 8, 1897, he was a servant of the defendant, engaged in its employ as a brakeman on a freight train which was being operated and run over defendant's said road from the town of Flora, in the state of Illinois, into and through Daviess county in the state of Indiana. On said day, at the station of Clay City in the state of Illinois, while the plaintiff was assisting in the operation and running of said freight train as such brakeman, it became and was his duty to assist in making ²⁷ what is denominated and known as a "running or flying switch"; and while so engaged he was, without any fault or negligence on his part, jerked and thrown under a moving car, which ran over and crushed one of his legs, and thereby the amputation of said limb was rendered necessary. The accident in question is alleged to have been caused by the violent and sudden start and speed of the engine attached to the train, which engine was in charge of, and was being operated by, one Michael Griffin, a locomotive engineer then and there in the service and employ of the defendant. The plaintiff in his complaint charges the accident, which occurred at Clay City, Illinois, and the injury resulting therefrom, to be wholly due to the negligence of Griffin, the engineer, in the operation and management of said engine at the said time and place.

The lower court adjudged the complaint to be sufficient on demurrer. The complaint, as we have shown, discloses that the accident by which appellee was injured occurred in the state of Illinois: consequently if he has the right of action against appellant, such right arose under the laws of the lat-

ter state. The facts conclusively show that appellee and the engineer to whose negligence the cause of the injury is imputed were, under the circumstances, at the time of the accident nothing more than fellow-servants of each other, both in the service of appellant, their common master. He does not profess by his complaint to base his cause of action on any statute of the state of Illinois. The rule of the common law which asserts that the master is not liable in an action by one of his servants for an injury sustained through the negligence of a fellow-servant is a familiar one. When tested by this rule of the common law, as it prevails and is enforced in this state by our decisions, the complaint in question does not state a cause of action against appellant. We are bound to presume that the same common-law rule as recognized and enforced in this jurisdiction obtains in the state of Illinois, and is enforced by the highest court thereof in like manner²⁸ as we enforce it, until the contrary is shown. Hence it must be held that, under the laws of the state in which the injury complained of was inflicted, the complaint does not state or disclose a right of action against appellant. Unless the negligent act of appellant's servant, to which appellee imputes his injury, which act, as shown, occurred wholly in the state of Illinois, created a liability or right of action in that state against appellant in favor of appellee, no such right or liability can be asserted to exist elsewhere. Certainly, if no right of action existed in that state in his favor, he could carry no right of action with him by coming into the state of Indiana and instituting a suit against appellant in the courts of the latter state. This rule of the law is universally affirmed and settled: *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156; *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169, 15 N. E. 230. In the latter case this court, on page 176 (113 Ind., 15 N. E. 233), said: "All the cases agree that, whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred: *Hyde v. Wabash etc. Ry. Co.*, 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351; *State v. Pittsburgh etc. Ry. Co.*, 45 Md. 41. . . . Unless the alleged wrong was actionable in the jurisdiction in which it was committed, there is no cause of action which can be carried to and asserted in any other jurisdiction": Citing numerous authorities. As further supporting this proposition, see *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126, 38 Am. St.

Rep. 163, 11 South. 803, and the many authorities therein cited on page 131 of the official report; Davis v. New York etc. R. Co., 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815; Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Railway Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Debevoise v. New York etc. R. R. Co., 98 N. Y. 377, 50 Am. Rep. 683; Louisville etc. R. R. Co. v. Whitlow, 19 Ky. Law Rep. 1931, 43 S. W. 711; Hamilton v. Hannibal etc. R. R. Co., 39 Kan. 56, 18 Pac. 57; Smith v. Condry, ²⁹ 1 How. 28; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224, and cases there cited; Story on Conflict of Laws, sec. 609.

The rule that if the law of the state or jurisdiction where the wrong is committed, when applied to the case, does not give a right of action against the wrongdoer, then no action can be sustained, is so well established that we may dismiss the question without further consideration.

Counsel for appellee, however, in their argument in support of the complaint, seek to apply the provisions of the fourth clause of section 1 of the employers' liability act passed by the legislature of this state in 1893: Acts 1893, p. 294; Burns' Rev. Stats. 1901, secs. 7083-7087. The first section of this act declares "that every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: . . . 4. *Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployé or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployé or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing law.*" (Our italics.)

By that part of the clause which we have italicized a liability against a railroad corporation is created in this state, where previous to the enactment of this statute none existed under the common-law rule. We cannot presume that the ³⁰ legis-

lature intended to exceed its territorial jurisdiction or power by extending the operation and effect of this statute so as to create a right of action in favor of the servant against the railroad corporation for any injury sustained in a sister state through the negligence of a fellow-servant, where no such right under the laws of the latter state existed. That a statute of this state prescribing a penalty or giving a right of action for a tort committed can have no extraterritorial force or effect so as to create thereby a right of action in another state, is a well-settled rule: *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Western Union Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305, and authorities cited therein; *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987; *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169, 15 N. E. 233. In the latter case, this court said: "The general proposition may be conceded that statutes have no extraterritorial force beyond the state in which they were enacted, but it is nevertheless true that civil rights acquired under a statute are not confined to the limits of the state in which the right accrued. Such rights, out of regard for the principles of comity existing between states, will be enforced in the courts of any state which can obtain jurisdiction of the defendant, provided to enforce them does not violate the law or policy of the state in which they are sought to be enforced."

In *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, we said: "The general laws, regulations, or decisions of the courts of a sister state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions": Citing authorities.

While the law of the place where the injury was occasioned or inflicted governs in respect to the right of action, nevertheless the law of the forum where the action is prosecuted to obtain redress which pertains to the remedy only, controls. The question whether the injured servant shall have a right of action against the master for the injury sustained through the negligence of a fellow-servant is certainly ³¹ one which deals with the right or cause of action, and not with the remedy or procedure to enforce such right.

It is seemingly urged by counsel for appellee that, inasmuch as he is shown to be a citizen of this state, therefore appellant is, by reason of section 4 of the employers' liability act, debarred from claiming that, under the facts disclosed by the complaint, no right of action or liability existed against it un-

der the laws of the state of Illinois. This section reads as follows: "In case any railroad corporation which owns or operates a line extending into or through the state of Indiana, and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

Whatever the purpose of the legislature in the enactment of this section may have been, it is manifest that it cannot be invoked to give appellee a right of action against appellant for an injury sustained by him in the state of Illinois, if such right does not exist under the law of that state. Again, if appellant had a valid, existing cause of defense under the law of the state of Illinois to the action in question, which it could have asserted and proved in that state had the action been prosecuted therein, certainly then it is beyond the power of the legislature by the section in controversy to destroy such vested right by depriving appellant of asserting the same when sued in the state of Indiana. Such an act of the legislature would evidently operate as an unconstitutional confiscation of property rights: See section 21 of our Bill of Rights; articles 5 and 14 of the amendments to the constitution of the United States; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841. The law recognizes ³² that a vested right of defense to an action is, in a sense, property, as much so as is a vested right of action, and is equally protected as in the latter against an attempt of the legislature to destroy or take it away. The doctrine in respect to the vested right of defense is stated in *Cooley on Torts*, at top of page 552, as follows: "But it is agreed that to support an action the act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action, if brought there, must be a good defense everywhere." The same author, in his work on *Constitutional Limitations*, at page 443 says: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102, the court asserts the proposition that a vested cause of defense

is as equally protected from being cut off or destroyed by an act of the legislature as is a vested cause of action. The court in that case, on page 141 of the official report, said: "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights."

It surely cannot, in reason, be insisted that the section in question, so far as it precludes a railroad company, when sued as is appellant, under the circumstances in this case, from asserting and exhibiting its right to a valid, existing defense, may be justified or upheld on the ground that its provisions should be regarded as regulating the procedure or practice on the part of a defendant railroad company in cases of this character. But the legislature, in regulating the practice and procedure in courts of justice, cannot ³³ thereby wholly preclude a defendant from asserting and proving a right of defense to an action instituted against him. In Cooley's Constitutional Limitations, sixth edition, on page 452, that eminent author in treating the subject of the alteration of the rules of evidence, says: "But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. . . . It has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights, . . . it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs."

The rule is well settled that the legislative department is not authorized to declare that certain facts or evidence shall create a conclusive presumption, and thereby override the essential facts in the case, or preclude a party in an action from asserting and proving the truth: *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *Heagy v. State*, 85 Ind. 260; *Johns v. State*, 104 Ind. 557, 4 N. E. 153; *Board etc. v. State*, 120 Ind. 282, 22 N. E. 255; *State v. Beach*, 147 Ind. 74, 46 N.

E. 145. In the latter case this court, on page 79 (147 Ind., 46 N. E. 146), of its opinion, said: "A law which would in effect exclude the evidence of a party and thereby deny him the right to be heard would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional. . . . If, however, the legislature, in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional." ³⁴ It must follow, then, for the reasons stated, that so far as section 4, in controversy, can be said to deprive or preclude appellant from asserting on demurrer to the complaint of appellee that the facts alleged therein do not entitle him to a recovery, or that it cuts off and deprives such railroad company from availing itself of any legitimate right or cause of defense in bar of the action existing under the laws of the state of Illinois, such legislation must be held to be an invalid exercise of legislative power.

We conclude that the complaint, for the reasons given, does not state a cause of action against appellant, and therefore, the court erred in overruling the demurrer thereto, for which error the judgment below is reversed and the cause is remanded to the lower court, with instructions to sustain the demurrer to the complaint.

The Doctrine of the Principal Case, that the law of the state in which an employé is injured through the negligence of a fellow-servant, determines the right to recover therefor, and that the common-law rule of the nonliability of a master to his servant for the negligence of a fellow-servant is presumed to prevail in a sister state, is affirmed in *Baltimore etc. Ry. Co. v. Jones*, 158 Ind. 87, 62 N. E. 994. For other authorities to the same effect, see *Brewster v. Chicago etc. Ry. Co.*, 114 Iowa, 144, 86 N. W. 221, 89 Am. St. Rep. 348, and cases cited in the cross-reference note thereto.

Vested Rights.—The legislature cannot deprive a defendant of a vested right in an existing material defense: *Magniar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182. This rule does not apply, however, to a defense not appertaining to the merits: See *Danforth v. Groton Water Co.*, 178 Mass. 472, 86 Am. St. Rep. 495, 59 N. E. 1033. See, in this connection, *State v. Heldenbrand*, 62 Neb. 136, 89 Am. St. Rep. 743, 87 N. W. 25.

SOULES v. ROBINSON.

[158 Ind. 97, 62 N. E. 999.]

LUNACY INQUISITION—Presence of Subject of Inquiry.—

Though the record of a cause, in which a person is adjudged insane, and a guardian appointed, is silent as to his appearance or presence in court, or as to notice given him, it will be presumed, as against collateral attack, that the court acquired jurisdiction. (p. 302.)

LUNACY INQUISITION.—A Judgment Pronouncing a person insane, and under guardianship, if not void, fixes the status of such person, while it stands unrevoked, and a judgment of another court in a different county as to such person's sanity is void. (p. 304.)

GUARDIANSHIP.—There Cannot be Two Guardianships of the same person and property in this state at the same time. (p. 304.)

Action by Soules, as guardian of one Reeves, against Robinson and another to set aside defendants' appointments as guardians for Reeves. From a judgment for defendants the plaintiff appeals.

S. R. Hamill, J. L. Price, and F. S. Rowley, for the appellant.

G. A. Knight and F. J. S. Robinson, for the appellees.

97 MONKS, J. This case was transferred from the appellate court under clause 2 of section 10 of the act of 1901 (Acts 1901, p. 567), for final determination.

In September, 1882, the Clay circuit court, in a proceeding brought for that purpose, under sections 2544-2555 of the Revised Statutes of 1881, adjudged that Cassius E. Reeves was a person of unsound mind and incapable of managing his estate. The record of said cause in which said Reeves was adjudged a person of unsound mind is entirely silent as to the presence of said Reeves in court, or his appearance to said action, or as to any notice being given to or served upon him. At the **98** same time the court appointed Cyrus Reeves guardian of said Cassius E. Reeves upon his giving bond as such guardian in the sum of \$100. On the ninth day of July, 1886, said Reeves filed his bond in said sum, which was duly approved. On January 30, 1890, said guardianship trust was, by order of the court, stricken from the docket of said court. Afterward, in May, 1890, while the Clay circuit court was not in session, the judge of said court at chambers ordered that said trust be reinstated upon the docket, and that the bond of the guardian

of said Cassius E. Reeves be fixed at \$25,000, and said Cyrus Reeves failing to give said bond in the sum of \$25,000, an order of the court was made and entered of record, removing him as such guardian, and appointing appellee, Frederick J. S. Robinson, guardian of the person and estate of said Cassius E. Reeves. Said Robinson executed his bond as such guardian in the penalty of \$25,000, which was approved, and letters of guardianship were issued to him. Afterward, in October, 1891, he executed an additional bond as such guardian in the sum of \$25,000, which was duly approved. Since said appointment said Robinson has acted as guardian of the person and estate of said Reeves, which estate is of the probable value of \$17,000.

Appellant, who alleges that he is the guardian of said Cassius E. Reeves, a person of unsound mind and incapable of managing his estate, in 1897 brought this action against appellees, each of whom had been respectively appointed guardian of the said Reeves by the Clay circuit court, as heretofore stated, to set aside said appointments, and also to set aside the judgment of said court declaring that said Cassius E. Reeves was a person of unsound mind, and incapable of managing his own estate. It is alleged in the complaint that said Cassius E. Reeves, at the time said proceedings were commenced and the judgment rendered in the Clay circuit court, was an inhabitant of Vigo county, Indiana, and not of said Clay county; that no notice was ever given said Reeves of said proceedings, by summons or otherwise, ⁹⁹ and he had no notice thereof; that he never appeared to said proceeding in person or by attorney, and was not produced in open court at the trial of said cause, nor was there any entry of record showing that the court was satisfied that he could not be produced in court without injury to his health.

It will be observed that the record of the judgment and proceedings in the Clay circuit court in which said Reeves was declared of unsound mind is entirely silent as to any appearance of said Reeves thereto, or as to his presence in court, or as to any notice being given to or served upon him.

As the Clay circuit court is a court of general jurisdiction, and had jurisdiction of the subject matter of such proceedings, it will be presumed under such circumstances, as against collateral attack, that it acquired jurisdiction of the person of said Reeves before rendering the judgment: *Gridley v. College*, 137 N. Y. 327, 33 N. E. 321; *King v. Bell*, 36 Ohio St. 460, 470; *Shroyer v. Richmond*, 16 Ohio St. 455, 456; *Hackman v.*

Adams, 50 Ohio St. 305, 315, 318, 34 N. E. 155; Bush v. Lindsey, 24 Ga. 245, 248, 71 Am. Dec. 117; Warner v. Wilson, 4 Cal. 310; Ockendon v. Barnes, 43 Iowa, 615; notes to State v. Billings, 43 Am. St. Rep. 534-537; notes to Balton v. Schriever, 18 L. R. A. 242, 243; Woerner's American Law of Guardianship, 111, 112, 389, 446, 447; 1 Woerner's American Law of Administration, sec. 145; Freeman on Judgments, 4th ed., sec. 124; Dequindre v. Williams, 31 Ind. 444; Bruce v. Osgood, 154 Ind. 375, 377, 378, 379, 56 N. E. 25; Cunningham v. Tuley, 154 Ind. 270, 56 N. E. 27; Long v. Ruch, 148 Ind. 74, 78, 47 N. E. 156; Earle v. Earle, 91 Ind. 27, 42; Clark v. Hillis, 134 Ind. 421, 426, 427, 34 N. E. 13, and cases cited.

It is a general rule that, when want of notice does not affirmatively appear from the face of the record of a court of general jurisdiction, the judgment is not void: Clark v. Hillis, 134 Ind. 421, 427, 34 N. E. 13; Palmerton v. Hoop, 131 Ind. 23, 30 N. E. 874; Earle v. Earle, 91 Ind. 27. It is evident that said judgment of the Clay circuit court is not void, and is not, therefore, subject to collateral attack: Lee v. McClelland, 157 Ind. ¹⁰⁰ 84, 60 N. E. 692, and cases cited. In such a case, if there was in fact no appearance, and the subject of the inquiry was not produced in open court, nor any notice given to or served upon him, and the record is silent as to such matter, although the judgment is not subject to collateral attack, it may set aside by the court in which it was rendered on the application of any person who has the right to be heard: Note to State v. Billings, 43 Am. St. Rep. 534, 536; Gridley v. College, 137 N. Y. 327, 330, 33 N. E. 321; Matter of Blewitt, 131 N. Y. 541, 30 N. E. 587. See, also, Dickerson v. Davis, 111 Ind. 433, 435-438, 12 N. E. 145, and authorities cited.

It is insisted by appellees that this proceeding brought by appellant is a collateral attack on said judgment of the Clay circuit court, and that said judgment not being void, this action must fail. Treating this action as a direct attack on said judgment as claimed by appellant, he has no right to maintain it. The judgment of the Clay circuit court declaring said Reeves a person of unsound mind gave that court jurisdiction to appoint a guardian of the person and estate of said Reeves: Rev. Stats. 1881, sec. 2546. When Cyrus Reeves was appointed such guardian, and executed his bond as required, and letters of guardianship issued, he was entitled to the custody of his ward, and such guardianship extended to all the ward's property in this state: Rev. Stats. 1881, sec. 2542, 2551.

Even if the removal of said Reeves as guardian, and the appointment of Robinson as guardian in 1890, were void, the jurisdiction would remain in said court until ended by the death of said ward, or his return to sanity and the determination of that fact by the Clay circuit court under the provisions of section 2773 of Burns' Revised Statutes of 1901 (Rev. Stats. 1881, sec. 2553).

Said judgment, not being void, fixed the status of the said Cassius E. Reeves in this state as a person of unsound mind, and incapable of managing his own estate, and as one under guardianship, and the same is conclusive until set aside: *Talbot v. Chamberlain*, 149 Mass. 57, 59, 20 N. E. 305; ¹⁰¹ *Leonard v. Leonard*, 14 Pick. 280, 283, 284; *Shroyer v. Richmond*, 16 Ohio St. 455, 465, 466; *Woerner's American Law of Guardianship*, 446, 447; *Heckman v. Adams*, 50 Ohio St. 305, 315, 318, 34 N. E. 155.

Under said judgment, the Clay circuit court had exclusive jurisdiction of said guardianship until the same was vacated and set aside on appeal, or by said court in a proceeding brought for that purpose: *Woerner's American Law of Guardianship*, 386, 446. So long as said judgment stands unrevoked, any proceeding under sections 2544-2555 of the Revised Statutes of 1881, in any other county in the state, as to the unsoundness of mind of said Cassius E. Reeves, which results in either the appointment of a guardian, or a judgment that said Reeves was of sound mind, would be void, and would in no way affect the judgment of the Clay circuit court, or its jurisdiction of said guardianship: *Cotton v. Wolf*, 77 Ky. (14 Bush) 238, 246; *In re Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381; 1 Thornton & Blackledge on Administration of Estates, 44; *Woerner's American Law of Guardianship*, 386. This is true because the judgment of the Clay circuit court, not being void, fixed the status of said Reeves as a person of unsound mind, and as being a person under guardianship, and that status can only be changed by the court which rendered said judgment in a proper proceeding. Moreover, there cannot be two guardianships of the same person and property in this state at the same time.

It follows that the judgment in the proceeding in which appellant was appointed guardian of said Reeves, and also his appointment as such guardian, were void. He cannot, therefore, maintain this action.

Judgment of the trial court affirmed.

Lunacy Inquisition.—The necessity of giving notice to the subject of a lunacy proceeding, and giving him an opportunity to be heard, is considered in the monographic note to *State v. Billings*, 43 Am. St. Rep. 531-541. In general, a valid proceeding to commit an insane person requires such notice and opportunity before judgment, and a statute abrogating the right to a hearing is unconstitutional: *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; *In re Lambert*, 134 Cal. 626, 86 Am. St. Rep. 296, 66 Pac. 851.

O'BRIEN v. CENTRAL IRON AND STEEL COMPANY.

[158 Ind. 218, 63 N. E. 302.]

PUBLIC NUISANCE.—The Erection of a Building across a street constitutes a public nuisance, and an individual cannot recover damages from the author, unless he sustains some particular or peculiar injury differing in kind and not common to that sustained by the public. (p. 306.)

PUBLIC STREETS.—An Abutting Owner, in addition to his right with the public to the use of the street from end to end for passage, has an individual property right in that part of the street necessary to free and convenient egress and ingress to his property, which cannot be interfered with without the wrongdoer being answerable. (p. 307.)

PUBLIC NUISANCE.—An Individual may Maintain an Action against one who constructs a building across the street some two hundred feet from the plaintiff's residence, and between it and the business part of the city. (p. 309.)

E. S. Holliday and F. A. Horner, for the appellants.

G. A. Knight, for the appellees.

²¹⁹ HADLEY, J. This case comes to us from the appellate court under section 15 of the act concerning appeals, approved March 12, 1901: Acts 1901, p. 569.

Appellants prosecute the action to recover of appellees damages for the obstruction of a street upon which their property abuts. Judgment against appellants upon demurrer to the complaint. The sufficiency of the complaint is, therefore, the only question presented.

In substance, it is averred in the complaint that the plaintiffs owned a house and lot abutting on Church street, in the city of Brazil, which they now, and have for many years, occupied as a residence; that when they purchased and first occupied said lot, which was before the grievances complained of, Church street was a regularly platted, dedicated, improved, and trav-

eled street, and constituted the only way, and was exclusively used by the plaintiffs in going from, and returning to, their home, and that in purchasing ²²⁰ said real estate they took into consideration its location on said street, which gave them convenient access to all parts of the city, and particularly to that part of the city lying east of their residence, where the business of the city is principally carried on; that in 1890 the defendants constructed, and still maintain, a permanent building on, over, and across said street, thereby completely obstructing the street, and preventing travel thereon; that said obstruction is located about two hundred feet east of the plaintiff's said residence, and between said residence and the business portion of the city; that there is no cross-street or other outlet between said obstruction and the plaintiffs' said property, and plaintiffs' egress and ingress to and from their property to the east is wholly barred, cut off, and destroyed; that by reason of the obstruction plaintiffs are put to great trouble and inconvenience in getting to and from their property, and their property has been thereby greatly diminished in value; that their property immediately before the obstruction was of the value of twelve hundred dollars; that by reason of the obstruction of the street as aforesaid their property became and is worth not exceeding six hundred dollars; and that said depreciation was caused wholly by the wrongful act of the defendants in obstructing said street.

Appellees contend that the injury of appellants, exhibited by the complaint, is different only in degree from the injury suffered by the community at large, and hence no action for the recovery of damages will lie. On the other hand, appellants contend that the injury complained of is private and special, and different in kind from the public injury, and that damages are recoverable therefor as for any other private wrong. This particular controversy is the question for decision.

The erection and maintenance of a permanent building across a public street, thereby closing it against travelers, constitutes a public nuisance, subject to indictment and abatement by the state: *City of Valparaiso v. Bozarth*, ²²¹ 153 Ind. 536, 55 N. E. 439, and cases cited on page 538 of 153 Ind. and page 439 of 55 N. E. But the individual has no right of action to recover damages from the author of such public nuisance, unless he is able to show that he has sustained some particular or peculiar injury, differing in kind, and not com-

mon to the general public: *Martin v. Marks*, 154 Ind. 549, 555, 57 N. E. 249. This doctrine springs from the principle that the law affords no private remedy for anything but a private wrong; that the damages resulting from a common, or public, nuisance, such as affects all the public in the same way, though perhaps in different degrees, is of a nature to be impossible of apportionment among the injured public, and therefore the only action maintainable is by the state: 3 Blackstone's Commentaries, 219; *Fossion v. Landry*, 123 Ind. 136, 140, 21 N. E. 96; *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 610, 50 Am. St. Rep. 343, 39 N. E. 223; *Manufacturers' Gas etc. Co. v. Indiana Gas etc. Co.*, 155 Ind. 566, 58 N. E. 851.

The inquiry therefore is, Does the complaint show that, by reason of the obstruction placed in Church street by the appellees, appellants have suffered an injury peculiar to themselves, and of a kind different from that suffered by the other residents of the community? The complaint alleges that when appellants purchased their property, and took up their residence therein, Church street, upon which it abuts, was a regularly platted, dedicated, improved, and traveled street, and furnished them the only means of going to and from their residence.

Under our law, when land is platted into lots, streets, and alleys, and recorded, the act is accepted as a dedication by the owner to the public of a continuing right to travel such streets and alleys, and a conveyance of a lot abutting on such a street carries with it not only the fee in the soil to the center of the street, but also the right to use such street, as dedicated, in perpetuity, for the purpose of egress and ingress to the premises. And so far as such street is necessary to a free and convenient way for travel to and ²²² from the lot, the right of the lot owner to use it for that purpose is appurtenant to his premises, is essential to its enjoyment, and is as inviolable as his right to the use of the property itself. In this respect the abutter's right is distinct, and altogether different, from the rights of the general public in the street. The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but in addition to this common right, he has an individual property right, appendant to his premises, in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal and unshared by the community, and

cannot be taken away or materially interfered with without the wrongdoer being answerable in damages, has been many times declared by this court: *Haynes v. Thomas*, 7 Ind. 38; *Pettis v. Johnson*, 56 Ind. 139; *Ross v. Thompson*, 78 Ind. 90; *Cummings v. City of Seymour*, 79 Ind. 491, 501, 41 Am. Rep. 618; *Indiana etc. R. R. Co. v. Eberle*, 110 Ind. 542, 546, 59 Am. Rep. 225, 11 N. E. 467; *Chicago etc. R. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759; *Decker v. Evansville etc. R. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Pittsburgh etc. R. R. Co. v. Noftzger*, 148 Ind. 101, 47 N. E. 332; *Martin v. Marks*, 154 Ind. 549, 555, 57 N. E. 249. See, also, *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

In the *Haynes* case, *supra*, it is said: "These decisions establish the principle that besides the right of way which the public has of passage over a street in a town or city, there is a private right which passes to the purchaser of a lot upon the street, and as appurtenant to it, which he holds by implied covenant that the street in front of his lot shall forever be kept open to its full width."

In the *Eberle* case, *supra*, *Mitchell, J.*, for the court, says: "Whatever may be the rule of decision elsewhere, nothing is better settled in this state than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. ²²³ This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a right appendant, and legally adhering to the contiguous grounds and the improvements thereon as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. . . . Nor can the street be invaded so as to inflict special and peculiar damage or injury upon the adjacent lot owner's property without rendering the wrongdoer liable for such damages."

This complaint alleges that the defendants have erected a permanent building across Church street, about two hundred feet east of the plaintiff's residence, thereby effectually barring all passage in that direction, and have thus cut off the plaintiffs from their usual and only way of direct travel to and from the east and business portion of the city, and have thus im-

posed upon them great trouble and inconvenience in getting to and from their property, by reason whereof their property has been depreciated in value from twelve hundred dollars to six hundred dollars. These facts show that the wrongful act of appellees has not only deprived appellants of their common right to use a regularly dedicated, improved and traveled street in front of their property, but it has placed that property in a cul de sac, with the base in the direction of the business and most frequented part of the city, thus making it necessary in going to market, or to the eastern part of the town, to travel in the opposite direction to the first cross-street.

If appellees may close this street on the east within the same square, without special injury to appellants, why may they not also close it on the west within the same square, and completely fence appellants in and render valueless their property without special injury? Surely the injury would be the same in kind. In such case it seems absurd ²²⁴ to say that the injury sustained by appellants in their property rights would be the same, but only greater in degree, as that sustained by the community in general. We have a class of cases which hold that when an obstruction does not exclude the abutter from ingress and egress, but only imposes upon him in common with other travelers that inconvenience which results from a more circuitous way, his injury is in common, for which there can be no recovery; as, for instance, if the obstruction in this case had been placed east of an intersecting cross-street, then it could not be said that appellants were excluded from approaching or leaving their premises in any direction originally afforded by the street.

That there may be others affected in a similar manner to appellants does not affect the question: *Martin v. Marks*, 154 Ind. 549, 560, 57 N. E. 249. In such cases an action for damages is maintainable by a person, or any number of persons, who are able to show that they have sustained special and peculiar damage different in kind from that sustained by the public in general. We think the complaint states a cause of action.

Judgment reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

Public Nuisance.—A private individual may maintain a bill to enjoin the erection of a building on an adjoining lot, so as to extend into the street, and thereby obstruct his easement of view and of

light and air: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144. And a private person may sue to enjoin the obstruction of a public highway as a public nuisance where he owns a farm, orchard, and nursery adjacent to the road, and there is no outlet for his products except by such highway: *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667. But see *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341.

TURPIE v. LOWE.

[158 Ind. 314, 62 N. E. 484.]

JUDICIAL SALE, Redemption from—Limitations.—A proceeding in equity to redeem lands held by the defendant under a sheriff's deed, absolute on its face, but alleged to be a mortgage, is governed by the limitation of fifteen years. (p. 312.)

JUDICIAL SALE—Extension of Time for Redemption.—The statutory time within which lands sold on execution may be redeemed may be extended by contract without otherwise affecting the rights of the holder of the certificate of purchase. (p. 313.)

JUDICIAL SALE—Effect of Extending Time of Redemption. The mere extension by agreement of the time in which to redeem from a judicial sale does not convert the claim of the purchaser into a security which must be enforced by a new action, but his relation to the property remains that of a successful bidder at the sale. (p. 315.)

JUDICIAL SALE.—If the Period of Redemption from a judicial sale is created or extended by contract, the redemptioner must exercise his right within that time, or within a reasonable time if the time is not fixed and certain. (p. 316.)

STATUTE OF FRAUDS.—An Agreement to Extend the Time to Redeem from a judicial sale of land, when acted upon by the parties, is not within the statute of frauds. (p. 316.)

STATUTE OF FRAUDS.—Contracts Within the Statute are not void, but merely voidable. (p. 316.)

Action by Turpie and others against Lowe to redeem from an execution sale. From a judgment for the defendant the plaintiffs appeal.

E. B. Sellers, M. Winfield and D. C. Justice, for the appellants.

Guthrie & Bushnell, for the appellee.

315 DOWLING, J. The fifth paragraph of the complaint, docketed as a separate action, states in substance that William Turpie and James H. Turpie were the owners of a tract

of land situated in White county, Indiana, containing four hundred and forty acres, upon which one Braxton held a mortgage; that a ³¹⁶ judgment of foreclosure had been rendered in a suit upon the mortgage; that the mortgaged lands had been duly sold by the sheriff of White county to Braxton under the decree, and that a certificate of purchase had been executed to Braxton by the sheriff; that the time for the redemption of said lands from the sale expired December 15, 1885; that before the date last named Braxton agreed to extend the time allowed by law for the redemption of said lands, in consideration of the payment of the amount of the bid with eight per cent interest thereon, and to assign the certificate of purchase to the said Turpie and Turpie, or to such other person as they might designate; that on December 15, 1885, the said Turpie and Turpie informed the appellee Lowe of their agreement with Braxton, and in consideration of the payment of two thousand seven hundred dollars, the amount then due upon the certificate of purchase, and for delinquent taxes, and the further sum of one hundred dollars, Lowe agreed to advance and pay for the said Turpies the amount due to Braxton, and the said taxes, the Turpies promised that they would cause Braxton to assign the said certificate of purchase to Lowe, who was to hold the same as security only, for the repayment of the said sum of two thousand eight hundred dollars, with interest thereon at the rate of eight per centum; that Lowe advanced the two thousand seven hundred dollars to Braxton, and that, at the request of the Turpies, Braxton assigned the certificate of purchase to Lowe, who thereafter held the same as security for the repayment of two thousand seven hundred dollars advanced by him, and the one hundred dollars bonus agreed to be paid him; that immediately after obtaining the said certificate, Lowe, without the consent of the Turpies, surrendered the same to the sheriff of White county, and procured a deed for said lands, which he caused to be placed on record; that thereafter Lowe denied that the Turpies had any rights to, or interest in, said lands; that he thereupon took, and ever since has held, possession of said lands, adversely to the Turpies, claiming to be the owner thereof; that he has held such possession for fourteen years, receiving the rents and profits ³¹⁷ of said lands which were worth one thousand dollars; that he has refused to account to the Turpies for such rents and profits, and that they exceed any sum advanced by him; and that the Turpies stand ready to pay any sum found

due from them to Lowe. The complaint concludes with a prayer that the Turpies be allowed to redeem the land, and that they recover judgment for the excess of the rents and profits received by Lowe over the amount due to him.

Pending the action, one of the plaintiffs, James H. Turpie, died, and his heirs at law were substituted as parties plaintiff.

The defendant answered in denial, and also set up the defense of the statute of limitations of six and ten years. Demurrers to the special answers were overruled, and the plaintiffs filed their reply, the first paragraph of which was a general denial. The defendant below filed a cross-complaint, alleging his ownership of the land, and that the plaintiffs wrongfully asserted an interest in or title to the same. He asked that his title be quieted. Answer in denial of cross-complaint. A special finding of facts was made, with conclusions of law thereon, and, over a motion for a new trial, judgment was rendered for the defendant and cross-complainant, Lowe. The plaintiffs below appeal, and assign for error the overruling of the demurrers to the answers setting up the statute of limitations and the overruling of the motion for a new trial.

The decision of the court upon the demurrers to the answers alleging that the cause of action did not accrue within six years or ten years before the commencement of the suit was plainly erroneous. The action was one of equity jurisdiction, and its object was the redemption of the lands held by the defendant under a sheriff's deed absolute upon its face, but alleged to be in fact a mortgage or security only for the repayment of a debt. None of the specifications of section 293 of Burns' Revised Statutes of 1901 applies. Nor was this an action for the recovery of real property sold on execution, brought by the ³¹⁸ execution debtor, to which specification 3 of section 294 of Burns' Revised Statutes of 1901 relates. The case belonged to that class of actions not barred by any other statute, and was governed by the limitation of fifteen years: Burns' Rev. Stats. 1901, sec. 295; *Barr v. Vanalstine*, 120 Ind. 590, 22 N. E. 965; *Ringle v. First Nat. Bank*, 107 Ind. 425, 429, 8 N. E. 236; *Nutter v. Hawkins*, 93 Ind. 260, 264.

But while the ruling on these demurrers was erroneous, it does not follow that the judgment must be reversed. The plaintiffs below did not stand upon this decision, but filed replies to the answers setting up the bar of the statute and

went to trial. The special finding and the proof show that they failed to sustain the material allegations of their complaint, and that the judgment was properly rendered in favor of the defendant. It was averred in the complaint that Lowe took an assignment of the certificate with the agreement that he would hold the same as security only for the amount paid by him to Braxton, and for the delinquent taxes, together with the bonus of one hundred dollars, with eight per cent upon the whole amount, and that he would not procure a deed upon the certificate. The court found that the agreement between the Turpies and Lowe was that the former should redeem the lands within one year from December 7, 1885; that the Turpies never did redeem; and that no claim of such right was made by them for more than five years from the time of the assignment of the certificate of purchase. The assignment of certificates of purchase of real estate at sheriffs' sales is expressly authorized by statute: Burns' Rev. Stats. 1901, sec. 778; Splahn v. Gillespie, 48 Ind. 397; Maddux v. Watkins, 88 Ind. 74; Conger v. Babcock, 87 Ind. 497.

It is well settled that the statutory period within which lands sold on execution may be redeemed may be extended by contract without otherwise affecting or impairing the rights of the holder of the certificate of purchase. The leading case upon this subject is Southard v. Pope, 9 B. Mon. 261, in which it is said: "The extension of the time of redemption ³¹⁹ is merely a waiver of the forfeiture of the right until that period arrives, and cannot, without an evident perversion of the true design of the parties, have the effect of converting the purchase into a mere lien to secure the repayment of the purchase money. As an agreement by the purchaser to prolong the time might operate to prevent a redemption within the legal period, a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in the execution, and authorize an application by him to a court of equity for relief. But where the purchaser acts in good faith in extending the time, and the defendant in the execution fails to redeem within that time, his equity of redemption is lost. The extension of the time does not justify the inference that the purchaser intends to surrender the benefit of his purchase. Such an inference would be forced and unwarranted. Such is not the understanding or design of the parties, or the legal effect of

the act. The purchaser derives no advantage from the indulgence; it is intended exclusively for the benefit of the other party. It is not inconsistent with the right claimed to hold the land under the purchase in the event of a failure to redeem before the expiration of the time. The omission to redeem, according to the agreement, renders the purchase absolute and irredeemable. This is evidently the expectation and understanding of both parties in such a case, and the indulgence being obviously for the benefit of the debtor should not be prohibited, which in effect it would be by giving it the legal operation contended for. Although, therefore, an extension of the time was given, yet as Southard did not pay the purchase money and interest within the time, it gave him no right to redeem after the time had expired": See, also, *Ferguson v. Smith*, 7 Bush, 76; *Ross v. Sutherland*, 81 Ill. 275.

The general rule is thus stated in *Rorer on Judicial Sales*, second edition, section 1159: "But a mere agreement to extend the ³²⁰ time of redemption from execution sale is only a waiver for the time being of the forfeiture of the right to redeem during the time so specified, and will not have the effect of converting the purchase into a lien for repayment of the purchase money."

While no decision upon the precise question presented here has been made by this court, it has repeatedly been held that delay of the purchaser in procuring a deed does not affect his rights under his certificate: *Jones v. Kokomo Building Assn.*, 77 Ind. 340; *Maddux v. Watkins*, 88 Ind. 74, 79. So, too, it has been declared that a valid assignment of the certificate may be made by the purchaser as well after as before the expiration of the year allowed for redemption: *Conger v. Babcock*, 87 Ind. 497; *Maddux v. Watkins*, 88 Ind. 74, 79. And the holder of the certificate may permit the execution defendant to redeem the land after the statutory period for redemption has expired: *Taggart v. McKinsey*, 85 Ind. 392. The cases in this state seem to be entirely in harmony with the rule laid down in *Southard v. Pope*, 9 B. Mon. 261.

If the purchaser receives any part of the redemption money, under an agreement to extend the time of redemption, thereby permitting a partial redemption, he waives his right to a deed, and the certificate becomes merely the evidence of a lien upon the land as security for the payment of the residue of the redemption money: *Hughart v. Lenburg*, 45 Ind. 498; *Spath v. Hankins*, 55 Ind. 155; *Felton v. Smith*, 84 Ind. 485; *South-*

ard v. Pope, 9 B. Mon. 261; Ott v. Rape, 24 Wis. 336, 1 Am. Rep. 186.

But where there is merely an agreement to extend the time of redemption beyond the year, and nothing is paid on account of such redemption, the extension does not convert the claim of the purchaser into a security which must be enforced by a new action. The relation of the purchaser to the land remains that of a successful bidder at the judicial sale, with all of the rights secured to such bidder by the ³²¹ statute governing such sales. We can discover no sufficient reason why an agreement for an extension of the time of redemption should not be sustained. It is not forbidden by any principle of law, and it is highly beneficial to the defendant whose lands have been sold on execution. If it should be held that the legal effect of an agreement for an extension of the time of redemption is to set aside the sale, vacate the judgment, and leave the purchaser a naked right to enforce a lien for the repayment of the amount of the bid and interest thereon, few purchasers at judicial sales would be willing to place themselves at such disadvantage. These views are reinforced by numerous decisions of this court and the courts of other states, in which it is held that an agreement for an extension of the time of redemption will be enforced against the purchaser: Butt v. Butt, 91 Ind. 305; McMakin v. Schenck, 98 Ind. 264; Stephens v. Illinois etc. Ins. Co., 43 Ill. 327; Pensoneau v. Pulliam, 47 Ill. 58; Davis v. Dresback, 81 Ill. 393.

If such agreements are valid as against the purchaser, they must also be sustained as against the defendant in execution. The contract binds the purchaser to a waiver of his right to demand a deed during the time of the extension of the right to redeem. It requires the owner of the land to redeem within that time. If the purchaser is precluded from obtaining a deed during the period of extension, the defendant can assert no right to redeem after the expiration of the time agreed upon. The rights of the parties, respectively, arise out of the contract. The agreement is not to be treated as a legal trap for the purchaser, which holds him fast, while it not only releases the land owner from the particular obligation to redeem within a fixed time assumed by him, but actually excuses him from redeeming the land at all, and compels the purchaser to begin a new suit for the enforcement of his claim.

As the right to redeem land from a sale upon execution is ³²² derived from the statute, where the statutory right of re-

redemption is to be exercised, the statute must be strictly pursued: *Eiceman v. Finch*, 79 Ind. 511; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231, 36 N. E. 615. So, where the period for redemption is either created or extended by contract, the owner of the land or other redemptioner must comply with the terms of the contract, or lose his right to redeem.

If the time for redemption is not fixed and certain, the right must be asserted within a reasonable time, or it will be considered waived. The declaration of the rule in such cases by Lord Chancellor Camden in *Smith v. Clay*, Amb. 645, 3 Brown Ch. (Perk. ed.), 640, note, has been generally accepted as a correct statement of the effect of laches: "A court of equity . . . has always refused its aid to stale demands where the party slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court": See, also, *Williams v. Rhodes*, 81 Ill. 571; *Fletcher v. McGill*, 110 Ind. 395, 406, 10 N. E. 651, 11 N. E. 779.

An agreement for an extension of the time of redemption, although not in writing nor supported by any consideration excepting the promise of the redemptioner to pay the amount to become due, with interest, when acted upon by the parties, is not within the statute of frauds. It is said in *Butt v. Butt*, 91 Ind. 305, 307, that: "A statute which is intended to prevent fraud should not be permitted to be used for its promotion: *Arnold v. Cord*, 16 Ind. 177; *Teague v. Fowler*, 56 Ind. 569; *Butcher v. Stultz*, 60 Ind. 170. Contracts within the statute of frauds are not void, but merely voidable. When fully consummated, they become valid. They become binding when so far executed ³²³ that the parties cannot be placed in statu quo. The law, we think, is of universal application that the statute of frauds cannot be invoked for the protection of any right or undue advantage acquired by a contract not enforceable under its provisions."

Again, in *Schroeder v. Young*, 161 U. S. 334, 344, 16 Sup. Ct. Rep. 512, the supreme court of the United States say, by Brown, J.: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connec-

tion that before the time had expired to redeem the property, the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security: *Guinn v. Locke*, 1 Head, 110; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207; *Griffin v. Coffey*, 9 B. Mon. 452, 50 Am. Dec. 519; *Martin v. Martin*, 16 B. Mon. 8; *Butt v. Butt*, 91 Ind. 305; *Turner v. King*, 2 Ired. Eq. 132, 38 Am. Dec. 679; *Lucas v. Nichols*, 66 Ill. 41; *McMackin v. Schenck*, 98 Ind. 264. In *Southard v. Pope*, 9 B. Mon. 261, 264, it is said that 'a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the defendant in execution, and authorize an application by him to a court of equity for relief.' To the same effect are *Rector v. Shirk*, 92 Ind. 31; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

In the case before us the evidence of the Turpies as to the terms of the agreement between them and Lowe is indefinite and unsatisfactory. James H. Turpie stated that he and his brother talked about Lowe "buying in this certificate," ³²⁴ and that Lowe told him that he "would take it up"; and William Turpie testified that Lowe "was to hold it [the certificate] for us one year." Neither of the Turpies asserted that Lowe was not to have a deed in case they failed to pay the amount coming to him within the time agreed upon for redemption, nor that Lowe was to hold the certificate as a mere security for a loan, and as evidence of a lien upon the land. No note or other evidence of indebtedness was executed by the Turpies to Lowe. By their own admission, the Turpies failed to redeem the land from Lowe within the time they alleged he allowed them by his agreement. No attempt to assert and enforce such supposed right was made until after the lapse of fourteen years from the date of the transaction. Lowe held the certificate until January 18, 1886, when he produced it to the sheriff, and demanded and received a deed. He caused the deed to be recorded in the proper office, and, without objection on the part of the Turpies, he took possession of the lands and exercised exclusive ownership over them for fourteen years.

Under the evidence in the case the court could reach no other conclusion than that there was a failure of proof on behalf of the plaintiffs below that Lowe was the owner in fee simple of the lands, and that his title should be quieted against the claim of the Turpies. This being so, the plaintiffs were not entitled to an accounting; nor were they harmed by the proof and finding of the value of the rents and profits, and of the permanent improvements made by Lowe, even if such evidence was inadmissible, and the finding thereon erroneous.

It is objected by the appellants that the court erred in permitting Lowe to testify concerning the agreement between him and the Turpies, one of the Turpies being dead. The testimony of the deceased Turpie, given upon a former occasion, was introduced by the appellants, and the use of this testimony made Lowe a competent witness, in regard to the matters stated by the decedent in his testimony, as fully ³²⁵ as if he had been alive. Moreover, Lowe was a competent witness against the surviving Turpie, and if the testimony had been objectionable as to the heirs of the deceased, they should have objected to it on that ground, and asked that it be not considered upon their branch of the case. But if the testimony of Lowe is left out of the case, the result must be the same. The appellants failed in their proof.

We find no error in the record. The judgment is affirmed.

Baker, J., concurs in result only.

The Right to Redeem Property sold under execution is a right created by law, and the time for its exercise may be prolonged by the verbal agreement of the parties: *Griffin v. Coffey*, 9 B. Mon. 452, 1 Am. Rep. 519. But if the holder of the sheriff's certificate of sale accepts a part of the purchase money for which the property was sold, he converts his interest into a mere lien: *Ott v. Rape*, 23 Wis. 336, 1 Am. Rep. 186.

DAVIS COAL COMPANY v. POLLAND.

[158 Ind. 607, 62 N. E. 492.]

MASTER AND SERVANT—Safe Tools and Place to Work.—

By the common law an employer is required to exercise that degree of care in providing his employé a safe working place and tools and appliances which a reasonably prudent man would exercise under like circumstances. (p. 323.)

MASTER AND SERVANT.—An Employé Assumes the Risks, as a matter of contract, that are known to him, or might have become known, by the exercise of ordinary care, of which he has made no complaint. (p. 324.)

MASTER'S STATUTORY DUTY.—It is the Duty of an Employer to use the very means prescribed by statute for the safety of employés; he is not at liberty to adopt others, though in his opinion more efficacious. (p. 325.)

MASTER AND SERVANT.—The Fact that a Statute, which requires mine owners to provide for the safety of their employés, makes a failure to comply therewith a misdemeanor does not affect an employé's right to recover damages for personal injuries. (p. 325.)

CONSTITUTIONAL LAW.—The Right of Contracting as one sees fit stands untrammelled, as a general rule; but the state may restrict this right in the interest of public health, morals, and the like. (p. 326.)

CONSTITUTIONAL LAW.—A Statute Requiring Mine Owners to make provisions for the safety of their employés is not class legislation. (p. 326.)

CONSTITUTIONAL LAW.—To Classify Legislation by distinctions that naturally inhere in the subject matter is not to indulge in class legislation. (p. 326.)

MASTER AND SERVANT.—The Risks that Arise from an employer's disregard of specific statutory requirements for the safety of employés cannot be put upon an employé. (p. 327.)

MASTER AND SERVANT—Contributory Negligence.—Assumption of Risk is a matter of contract; contributory negligence is a question of conduct. (p. 328.)

MASTER AND SERVANT—Contributory Negligence.—If a coal miner tests the roof and finds the slate apparently secure, and no discoverable injury is immediately threatening, he is not compelled to give up his work on pain of being held negligent when the slate is unproped. (p. 329.)

G. A. Knight, for the appellant.

S. D. Coffey and A. W. Knight, for the appellee.

608 **BAKER, J.** This cause has been transferred here because the appellate court was equally divided on the questions involved: Davis Coal Co. v. Polland, 27 Ind. App. 697, 60 N. E. 1124.

Appellee had judgment against appellant for damages for personal injuries. The assignments are that the court erred ⁶⁰⁹ in overruling appellant's demurrer to the complaint, motion for judgment on the jury's answers to interrogatories notwithstanding the general verdict, and motion for a new trial.

1. The complaint is as follows: "Samuel Polland, plaintiff, complains of D. H. Davis Coal Company, defendant, and says that on the thirtieth day of November, 1897, the said defendant was, and for many years prior thereto had been, a duly organized corporation, organized under the laws of the state of Indiana for mining purposes; that the said defendant then was, and for a long time prior thereto had been, engaged in the business of mining coal in Clay county, Indiana, by means of a shaft sunk from the surface of the earth to the bed of said coal, and by means of driving entries through the same, from which said entries rooms were turned; that on said day said defendant had in its employ, engaged in mining coal in said mine, more than ten men, to wit, one hundred men; that on said day the plaintiff then was in the employ of the said defendant as a coal miner, engaged in mining coal in said mine, in a room on an entry running in a westerly direction from the bottom of said shaft; that by reason of the fact that the plaintiff was so engaged in the employ of the defendant as its servant in said mine it became and was the duty of the defendant to use reasonable care to furnish him a safe place in which to perform his said work, and to protect him therein, and to that end it became and was the duty of the defendant to keep constantly on hand at its said mine a sufficient supply of timbers, and to deliver at said working place of the plaintiff all props, caps, and timbers of proper length, when needed and required by the plaintiff, so that he might be at all times able to secure properly his said room from caving in; that it was the further duty of the said defendant, by its bank boss, to visit and examine each and every working place in said mine, including the room in which this plaintiff was at work at least ⁶¹⁰ every alternate day, and to examine and see that each and every working place in said mine, including the room in which this plaintiff so worked, was properly secured by props or timbers, and that safety was in all respects assured, and to see that a sufficient supply of props, caps and timbers was always on hand at this plaintiff's said room or working place in order that the same might be propped and made secure and safe; and the plaintiff alleges that the said defendant did not perform its

said duty in that behalf, but wholly failed and neglected so to do in this: That it did not keep constantly on hand a sufficient supply of timbers of proper length when needed and required by the plaintiff, so that he might be at all times able to secure properly his said room and working place from caving in, but, on the contrary, it negligently and carelessly refused and neglected to deliver the necessary props, caps, and timbers of proper length to the said plaintiff at his said working place, although often requested by the plaintiff so to do; that said defendant negligently and carelessly failed, by its bank boss, to visit and examine the said working place and room of the plaintiff at least every alternate day while the plaintiff was at work therein, and see that the same was properly secured by props or timbers, and that safety was in all respects assured, and see that a sufficient supply of props, caps, and timbers was always on hand at the said working place and room of this said plaintiff, but, on the contrary, did not visit said working place more than once a week, and negligently and carelessly permitted the same to remain without props, caps, and timbers for two days prior to the injury hereinafter complained of, so that by reason of the negligence of the said defendant as herein stated the plaintiff was unable to prop and make secure the said room and working place in which he was performing his said work; that by reason of the said negligence of the defendant, and by reason of the want of timbers, caps, and props of proper length to secure the same, the roof of ⁶¹¹ the said room in which the plaintiff was at work became and was weak and dangerous, which was well known by the defendant, or might have been known by it had it used reasonable diligence to ascertain the same; that by reason of the weak and unsafe condition of said room, caused as aforesaid from inability of the plaintiff to prop and secure the same for want of props, caps and timbers of proper length as aforesaid, the said roof of said room in which plaintiff was performing his work in said mine on the thirtieth day of November, 1897, suddenly gave way, caved in, and fell upon the plaintiff, thereby crushing and maiming the flesh and bones in his right leg below the knee, without any fault or negligence on his part: that by reason of said injury the plaintiff became sick, sore, and lame, and was confined to his bed for a long space of time, to wit, two months, and suffered and endured great bodily pain and mental anxiety and suffering, and has been permanently injured, and lost a large

amount of time, to wit, four months, of the value of three hundred dollars, and will never be able to earn money by his labor as he was prior to said injury; that said injury occurred wholly by the fault and negligence of the said defendant, while the plaintiff was in the exercise of due care and caution; that if the said defendant had performed its duty, and visited said working place of the plaintiff by its bank boss, and had seen that safety was in all respects assured, and seen that timbers, props, and caps of proper length were always on hand, said injury would not have occurred; that had the said defendant furnished this plaintiff with timbers, caps, and props, as was its duty, he could and would have propped and secured the roof of said room and working place so that the same would not have caved in, fallen upon, and crushed his said leg; that at and prior to the time of said injury there was nothing in the appearance of said roof to indicate immediate danger, and he was unable to find any defect therein by the usual and ordinary tests, but he says the same could and **612** would have been made by him perfectly secure but for the negligence of the defendant as herein alleged; that by reason of the injuries herein alleged and plaintiff has been damaged in the sum of three thousand dollars. Wherefore he demands judgment for three thousand dollars, and all other proper relief."

The parts of the statutes on mines that are pertinent provide: "Miners' bosses shall visit their miners in their working places at least once every day where any number not less than ten nor more than fifty miners are employed, and as often as once every two days when more than fifty miners are employed": Burns' Rev. Stats. 1901, sec. 7447; Horner's Rev. Stats. 1901, sec. 5172a. "The owner, operator, agent or lessee of any coal mine in this state shall keep a sufficient supply of timber at the mine, and the owner, operator, agent or lessee shall deliver all props, caps and timbers (of proper length) to the rooms of the workmen when needed and required, so that the workmen may at all times be able to secure properly the workings from caving in": Burns' Rev. Stats. 1901, sec. 7466; Horner's Rev. Stats. 1901, sec. 5180g. "The mining boss shall visit and examine every working place in the mine at least every alternate day while the miners of such place are or should be at work, and shall examine and see that each and every working place is properly secured by props and timber and that safety of the mine is assured. He shall see

that a sufficient supply of props and timber are always on hand at the miners' working places": Burns' Rev. Stats. 1901, sec. 7472; Horner's Rev. Stats. 1901, sec. 5480m. "For any injury to person or property occasioned by any violation of this act, or any willful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby": Burns' Rev. Stats. 1901, sec. 7473; Horner's Rev. Stats. 1901, sec. 5480m.

Two questions arise on the complaint: Assumption of risk and contributory negligence.

613 (1) The complaint does not negative the employé's knowledge of the employer's negligent failure to perform the duties imposed by statute, and of the dangers resulting therefrom.

If the cause of action in this case were based upon the employer's neglect to perform a common-law duty, or if there were no valid distinction between neglect of a common-law duty and neglect of a specific statutory duty, the complaint would be fatally defective: *Ames v. Lake Shore etc. Ry. Co.*, 135 Ind. 363, 35 N. E. 117; *Louisville etc. R. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513, 55 N. E. 440.

By the common law an employer is required to exercise that degree of care in providing his employé a safe working place and tools and appliances which a reasonably prudent person would exercise under like circumstances. The rule is general. There is no fixed quantum of care that must be exercised invariably in all cases. In each case the quantum of care required by the common-law rule is dependent largely upon the circumstances of that case and to quite an extent upon what the jury and court may think a reasonably prudent person would have done under those circumstances. The manner of constructing the working place, and the selection of tools and appliances, and the keeping of them in proper repair, therefore, are left to the employer's judgment and discretion without limitation except this: that he must do what a reasonably prudent person would do in his place. Now, if the employer does what he thinks comes up to this general standard, and if the employé examines the place and appliances, adds his judgment to that of the employer, and agrees as one of the terms of his contract of employment that the employer has done all that a reasonably prudent person should do under the circumstances,

and that he will notify the employer of after-occurring defects, the employé expressly assumes the risks that are known to him or might have become known by the exercise of ordinary care, of which he has made no ⁶¹⁴ complaint to the employer. So, also, the conditions being the same except that the assumption of risk is not expressly included in the contract of employment, the law reads into the contract, from the employé's knowledge and silence, his agreement to assume all known and obvious risks. Whether express or implied, assumption of risk is a matter of contract. In either case the employé whose injury is due to a known or an obvious defect in place or appliances, which he has suffered to continue without objection, cannot hold the employer liable—not because the employer was not in fact negligent, for he may not have exercised ordinary care; not because the employé was contributorily negligent, for at the time and under the circumstances of the accident he may have used due care to avoid injury; but because the employé has agreed for a sufficient consideration to absolve the employer, and to assume for himself the risk of such injury.

If a statute is a mere affirmation of the common-law duty of the employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. The standard of care continues to be the conduct of the reasonably prudent person under like circumstances; and the means of measuring up to it may still be the subject for the joint judgment and agreement of the employer and the employé.

If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the lawmakers believed that the operation of the common-law rules did not afford the employé sufficient protection; that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employé did not stand upon a footing of equality with the employer in contracting for his safety; and that the necessity of earning the ⁶¹⁵ daily wage frequently constrained the employé to put up with defective place and tools, without complaint, by reason of his fear of the consequences of complaining. From these conditions grew the necessity, or at least the propriety, of requiring certain specific measures to be taken for the protection of employes. The manner of constructing and maintaining the working places and appliances so as to measure

up to the general standard of the reasonably prudent person was no longer left to the judgment of the employer. A definite standard was fixed by the legislature. It is the duty of the employer to use the very means named in the statute. He is not at liberty to adopt others, though in his opinion they are more efficacious than those prescribed by the lawmakers. How, then, can there be any lawful basis for an agreement, implied or express, that the employer shall violate the law, and that the employé shall be remediless?

The doctrine of assumed risk, in its essential nature, constitutes a defense. The employé brings his action for damages for personal injury. It is based upon the employer's negligent failure to discharge a duty owing to the employé. Duties and rights are correlative—what is the duty of the employer to do for his employé is the right of the employé to require of his employer. The employer says: "You have no right of action against me because you contracted with me long before the accident happened that you would assume the very risk you are now complaining of." Such a contract, when the duty of the employer and the right of the employé are measured by the indefinite standard of care that a reasonably prudent person would have exercised under like circumstances, is enforceable. And so the heart of the present case is this: Is a contract enforceable by which the employé waives in advance his right of having, and relieves his employer of the duty of providing, the specific safeguards required by the statute?

The statute does not, in terms, forbid the making of such a contract. And it is said that the court should not hold it **616** to be impliedly forbidden, because, for one thing, the statute provides a punishment by fine for the employer's violations, and a second punishment for the same offense is not permissible. The action of the employé is solely to recover compensation for actual damages. The payment of compensative damages is not punishment. The right of the state to recover a penalty, and the right of an aggrieved party to recover compensation, are not inconsistent. Indeed, the right to the penalty (in the form of punitive damages) as well as to compensation might have been given to the aggrieved party—as in the telegraph cases: *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682. Since the two rights (or sanctions for enforcing observance) are independent of each other, the presence of the penal provision in the statute makes neither for nor against the right to compensation free from the defense of assumed risk. The case stands as if

the employer's failure to comply with the requirements of the act had not been made a misdemeanor.

It is true, as propounded by counsel, that the state cannot compel an injured employé to bring an action for damages, nor prevent his settling or dismissing it if begun. But the legislature may well have believed that the natural desire of employés to recover compensation for injuries would lead employers to fulfill the law. At any rate, those employers who are brought into court to defend have nothing to complain of on this score. The employé's right to control his lawsuit, however, does not touch the question of his right to bind himself in advance to absolve the employer from the performance of specific statutory duties.

Freedom of contract should not be lightly interfered with. As a general rule, the right of contracting as one sees fit stands untrammelled. But the state has power to restrict this right in the interest of public health, morals, and the like. When, in the present case, it is pointed out that the legislature has failed in terms to deny the employé's right to assume the risks from his employer's disregard of the statute, ⁶¹⁷ the question is not ended. If the legislature has clearly expressed the public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employé to waive in advance his statutory protection, the contract is void as unmistakably as if the statute in direct words forbade the making of it. If mines and factories and stores and railroads were to stand vacant, were not to be operated by citizens in whose lives and limbs the state has an interest, it is inconceivable that the legislature would have spoken as it has, even if it had authority to do so. To promote safety to life and limb, as indisputably as to advance public health, education and morals, to prohibit usury, to provide for exemption and stay of execution, the legislature has the right to act.

The statute in question is not class legislation. Employments differ in degree of hazard. Each has its separate dangers, which must be guarded against in the appropriate way. To classify legislation by distinctions that naturally inhere in the subject matter is not to indulge in class legislation. A law is general and uniform if all persons in the same circumstances are treated alike.

The purpose of this statute to promote the safety of miners being clear, and the right of the legislature to pass it being unquestionable, the court should not declare it a dead letter. If

the employer may avail himself of the defense that the employé agreed in advance that the statute should be disregarded, the court would be measuring the rights of the persons whom the lawmakers intended to protect by the common-law standard of the reasonably prudent person, and not by the definite standard set up by the legislature. This would be practically a judicial repeal of the act. It is no hardship to the employer to disallow him a defense based on an agreement that he should violate a specific statutory duty. His sure protection lies in obedience to the law. The ⁶¹⁸ risks that still inhere in the business after this is done may be assumed by the employé.

This is not the only instance in which the court has found a legislative limitation upon the right of contract, though not declared in terms. A contract by which a debtor undertakes in advance of judgment not to take a stay of execution or to claim exemption is held to be void, although the statute does not expressly forbid the making of such a contract: *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46. The lawmakers, in effect, said that it is contrary to public policy to allow a debtor to be stripped to nakedness. The state in many ways is interested in the debtor's being a self-respecting and self-sustaining citizen. Therefore, the debtor is not permitted to barter away the state's interest in him. And though, after judgment, he is not compelled to take a stay or claim his exemption, the legislature deemed that the public policy would be amply enforced by his privilege to do so. Other examples of this kind might be cited.

The conclusion that the employer may not put upon the employé the risks that arise from the employer's disregard of specific statutory requirements is supported by the following authorities: *Narramore v. Cleveland etc. R. Co.*, 96 Fed. 298, 37 C. C. A. 499; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 484; *Greenlee v. Southern Ry. Co.*, 122 N. C. 977, 65 Am. St. Rep. 734, 30 S. E. 115; *Baddeley v. Earl Granville* (1887), L. R. 19 Q. B. D. 423, 17 Eng. Rul. Cas. 212; *Groves v. Wimborne* (1898), L. R. 2 Q. B. D. 402; *Curran v. Grand Trunk R. Co.*, 25 Ont. App. 407.

(2) As to contributory negligence. The complaint alleges that appellee used due care and caution to avoid injury. This is enough, unless the specific averments show this general allegation to be untrue. It sufficiently appears that appellee was an experienced miner, knew that appellant had failed to provide supports as required by statute, and with this knowledge con-

tinued at his work until injured. ⁶¹⁹ Appellant claims that this constituted such negligence as to preclude a recovery. Counsel are confusing the doctrines of contributory negligence and assumption of risk. Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If appellee were to be defeated by the rule of assumed risk, it would be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose. If appellee were to be defeated by the rule of contributory negligence, it would be because his conduct, at the time of the accident under all of the attendant circumstances, fell short of ordinary care. If the one circumstance of the employé's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employé's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, may be not, depending upon whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary prudence, under all the circumstances, would take it, contributory negligence is not established. Appellee alleges that there was nothing in the appearance of the mine's roof to indicate immediate danger, that he was unable to find any defect therein by the usual tests, and that he could and would have propped up the slate securely if appellant had not been derelict in supplying timbers. The ⁶²⁰ specific averments do not overcome the general allegation of freedom from fault.

2. The answers to interrogatories upon which appellant claims judgment, notwithstanding the general verdict, show that appellee was an experienced miner: that slate from the roof fell upon him while he was working at the face of the coal vein; that slate is liable to fall at any time suddenly and without warning; that the falling of slate, if not propped, is an inherent danger in coal mining; that appellee had knowledge of such danger; that he knew that the roof of the room in which he was

working was composed largely of slate; that he knew that large quantities of slate had been falling almost daily; that it is not impossible nor difficult to tell whether slate is in the roof of a mine before it suddenly falls; that appellee examined the slate that fell on him a few minutes before it fell and believed it was safe; that appellant's bank boss could not have made any other test than appellee made; that the driver delivered props at appellee's room on Saturday preceding the accident on Tuesday; and that slate can be safely propped.

The questions of assumed risk and of contributory negligence are again presented in argument.

Appellee did not assume the risks arising from appellant's disregard of its statutory duties. The answers do not prove that these duties were performed. The props delivered on Saturday may have all been used as the work progressed into the vein of coal. The finding in the general verdict that appellant failed to perform its statutory duties stands unimpeached.

Do the answers override the general verdict on the question of contributory negligence? Large quantities of slate fell almost daily. But the evidence may have shown that some days none fell; that ordinarily a test would show what part of the slate would fall and what would hold; and that the chances were largely in favor of safety, if tests were made. Appellee made the best test possible, and found the ⁶²¹ slate apparently solid and secure. It could have been propped so that it would not have fallen. Appellee may have ordered props, and may have been expecting them to be delivered at any moment. No discoverable danger was immediately threatening. Under these circumstances he was not compelled to give up his work on pain of being held negligent.

3. On the evidence and instructions the same questions again arise. The evidence amply sustains the verdict, and the instructions are in harmony with the law as hereinabove declared.

Judgment affirmed.

A Master Owes to His Servant the Duty to provide a reasonably safe place in which to work and reasonably safe tools and appliances: See the monographic note to Mast v. Kern, 75 Am. St. Rep. 591-595; Western Stone Co. v. Muscial, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; Illinois Steel Co. v. McFadden, 196 Ill. 344, 89 Am. St. Rep. 319, 63 N. E. 671. The measure of his duty in this respect is the care required by the ordinary usage of the business: Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; Purdy v. Westinghouse etc. Mfg. Co., 197 Pa. St. 257, 80 Am. St. Rep. 816, 47 Atl. 237; Service v. Shoneman, 196 Pa. St. 63, 79 Am. St. Rep. 689, 46 Atl. 292.

A Servant Assumes the Ordinary Risks of the employment which are known by him, or which might be known by the exercise of ordinary diligence or care: See *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42, 88 Am. St. Rep. 841, 40 S. E. 368; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319, 63 N. E. 671.

The Duty of Mine Owners to their employés is considered in the monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557-595. Consult pages 584-595 of this note for a discussion of the constitutionality of modern statutes on this question and their effect upon the doctrine of contributory negligence and assumption of risks.

DOWNHAM v. HOLLOWAY.

[158 Ind. 626, 64 N. E. 82.]

THE DEED of an Insane Person not under guardianship is merely voidable, and vests title until disaffirmed by the grantor on becoming sane or by his heirs. (p. 331.)

AN INSANE GRANTOR Cannot Affirm or Disaffirm his deed so long as he remains of unsound mind. (p. 331.)

DEED OF INSANE PERSON.—The Statute of Limitations does not run from the date of the execution of a deed by an insane person so as to bar an action, on her death, by her heirs against the grantor for partition and to quiet title. (p. 331.)

Action by Charlotta Dowham and others for partition and to quiet title. From a judgment for the defendant the plaintiffs appeal.

I. W. Christian, W. S. Christian and E. E. Cloe, for the appellants.

R. K. Kane, T. E. Kane and T. J. Kane, for the appellee.

626 MONKS, J. It appears from the pleadings that on September 28, 1876, Nancy A. Holloway, a person of unsound mind, not under guardianship, conveyed eighty acres of real estate in Hamilton county, Indiana, to appellee, her son, who took and held exclusive and adverse possession thereof under said deed continuously until the commencement of this action on December 19, 1898. The consideration named in said deed was two thousand five hundred dollars, but no part thereof has ever been paid. Said Nancy A. Holloway **627** died intestate in July, 1898. After her death, and on November 28, 1898, and before

the commencement of this action, appellants, heirs of deceased, disaffirmed said deed on the ground that said Nancy was of unsound mind when she executed the same, and commenced this action for partition and to quiet their title as such heirs to their shares of said real estate. The statute of limitations was pleaded in bar of the action. If the same began to run when the deed was executed, on September 28, 1876, the judgment must be affirmed; if not, it must be reversed.

The deed of a person of unsound mind not under guardianship is not void, but only voidable: *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370-372, 77 Am. St. Rep. 481, 56 N. E. 97, and cases cited; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543; *Ashmead v. Reynolds*, 127 Ind. 441, 444, 26 N. E. 80. Such voidable deed vests the title to the real estate in the grantee the same as an unimpeachable deed until disaffirmed by the grantor on becoming sane, or by his heirs after his death: *Schuff v. Ransom*, 79 Ind. 458, 465; *Nichol v. Thomas*, 53 Ind. 42, 53.

So long as the grantor remains of unsound mind, he has no power to affirm or disaffirm such deed: *Nichol v. Thomas*, 53 Ind. 53; *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 372, 77 Am. St. Rep. 481, 56 N. E. 97, and cases cited.

It is the act of disaffirmance which renders such voidable deed a nullity, and not the proceedings which may be taken to give force to the disaffirmance after it has been made: *Ashmead v. Reynolds*, 127 Ind. 441, 444, 26 N. E. 80; *Long v. Williams*, 74 Ind. 115, 119.

Until such deed is disaffirmed, there is no right of action; in other words, the action does not accrue until after the disaffirmance: *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 372, 373, 77 Am. St. Rep. 481, 56 N. E. 97, and cases cited; *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80; *Fay v. Burditt*, 81 Ind. 433, 437, 42 Am. Rep. 142; *Schuff v. Ransom*, 79 Ind. 458, 465; *Nichol v. Thomas*, 53 Ind. 42, 53; *Welch v. Bunce*, 83 Ind. 382, 385; *Richardson v. Pate*, 93 Ind. 423, 426-428, 47 Am. Rep. 374.

⁶²⁸ In this case the grantor, Nancy A. Holloway, continued of unsound mind until her death. She therefore had no power to disaffirm said deed nor maintain any action for said real estate in her lifetime.

The statute of limitations will not begin to run until the cause of action accrues: *Buswell on Limitations and Adverse Possession*, 37, 38; *Angell on Limitations*, 6th ed., sec. 42; *Wood on Limitations*, 3d ed., sec. 117; *King v. Carmichael*, 136 Ind. 20,

28, 43 Am. St. Rep. 303, 35 N. E. 509, and cases cited. It follows that the statute of limitations did not begin to run when said deed was executed to appellee. The case must, therefore, be reversed.

Judgment, with instructions to sustain appellant's demurrer to the fourth and ninth paragraphs of appellee's answer, and for further proceedings not inconsistent with this opinion.

The Deed of an Insane Person is voidable only, and not void, at least if executed before an inquisition and finding of lunacy: French Lumbering Co. v. Theriault, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927; Woolley v. Gaines, 114 Ga. 122, 88 Am. St. Rep. 22, 39 S. E. 892; monographic note to Flach v. Gottschalk Co., 71 Am. St. Rep. 430-433.

The Statute of Limitations does not run against a person who is insane when he executes a deed or other contract; but the statute having once begun to run against a party, his subsequent insanity will not stop it: See the monographic note to Moore v. Armstrong, 36 Am. Dec. 71, 72; Grady v. Wilson, 115 N. C. 344, 44 Am. St. Rep. 461, 20 S. E. 514.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

LEBUS v. BOSTON.

[107 Ky. 98, 51 S. W. 609, 52 S. W. 956.]

A RIGHT OF WAY by Necessity is Extinguished upon a unity of title to the dominant and servient estate in one owner, although the way is still used by him, and a subsequent conveyance of the servient estate with express waiver of such right of way constitutes a surrender of the right, otherwise existing as a "right of way of necessity." (p. 337.)

WAYS BY NECESSITY—Evidence of Surrender of.—Parol evidence that a grantor expressly waived a right of way over land conveyed is admissible to rebut a claim of an implied reservation of such way as an easement of necessity. (p. 339.)

Z. Gibbons, for the appellant.

Thornton & Kerr, for the appellees.

⁹⁹ **BURNAM, J.** This action was brought by appellant against appellees to recover damages for obstructing a passway leading from a public highway over the lands of appellees to those of appellant, ¹⁰⁰ and to enjoin the further interference of the use of said passway by appellant.

The facts necessary to be stated, and about which there seems to be no dispute, are these: In November, 1871, Henry Cox and his wife conveyed to Charles Ann Cosby, for life, with the remainder to her children, a tract of eighty acres of land, and subsequently, in November, 1872, the same grantors conveyed to Judge Redmond, the father of Mrs. Cosby, a tract of one hundred and three acres of land, which was located between the eighty acres conveyed to Mrs. Cosby and the public road. There was no passway to or from the eighty acres conveyed to Mrs.

Cosby and her children to the public highway, and in the fall of 1872 Redmond gave to his daughter a passway over his tract, and Mrs. Cosby and her family used this passway over the one hundred and three acres until the death of her father, Judge Redmond, from whom she inherited the one hundred and three acres. On the fourteenth day of November, 1890, Mrs. Cosby and her husband sold and conveyed by general warranty deed the tract of one hundred and three acres to N. W. Frazier, which deed contained this reservation: "The first party is to give possession March 1, 1891, and it is further understood that the eighty acres above named is to bear its part of expenses as to gate," etc., "to the said eighty acres by the passway." A short time thereafter—in December, 1890—Frazier also purchased the eighty acres deeded to Mrs. Cosby and her children, which were sold under a judgment of the Harrison circuit court, thus becoming the owner in fee simple of both tracts of land, which he continued to own until the twenty-fourth day of February, 1896, when he sold and conveyed by general warranty deed ninety-three and fifty-four hundredths acres of the land to appellee, Margaret Ann Boston. Frazier died in 1897, and on the second day of October, ¹⁰¹ 1897, his heirs sold and conveyed the remainder of the one hundred and eighty-three acres, consisting of ninety and eleven hundredths acres, to appellant. It is alleged and shown by the proof that during the time that Frazier was the owner of both tracts of land he used the passway to get to the eighty-acre tract. The land conveyed to Mrs. Boston included that portion of the one hundred and three acres occupied by the passway, but there was no reservation thereof in the deed to her, whilst in the conveyance of the residue by the heirs of appellant this passway was expressly conveyed.

It is alleged by appellee that at the time of the sale and conveyance of the ninety-three and fifty-four hundredths acres by Frazier to her it was expressly agreed and understood, and was a part of the consideration for said conveyance, that no passway should remain over the land sold to her in favor of the residue of the tract retained by the vendor. This averment is denied, but is proven by W. R. Gregory; and Durbin (who examined the title of this land for Mrs. Boston) testifies that it was agreed that there was to be no passway over the land, and that Frazier stated that there was no necessity for such passway, as he had another outlet to another pike, and other ways to get out; and that it was only with this understanding that Mrs. Boston accepted the deed.

In 1890 the unity of possession and title to both tracts was in Frazier, and continued in him uninterruptedly until the sale, in 1896, to appellee.

It is the contention of appellee that Frazier could not have an easement in his own land, as the uses of an easement are covered by the general right of ownership; that the easement was merged and suspended in the larger estate; and having sold and conveyed that portion of the boundary occupied by the passway by unqualified grant, ¹⁰² there is no implied reservation of the use of it for the benefit of the grantor.

Whilst, on the other hand, it is contended by appellant that as Frazier, during the time that he was the owner of both tracts of land, continuously used the passway over the one hundred and three acres in traveling to and from the eighty-acre tract, and at the time of the sale it was notorious, visible, and well marked, and the purchaser took subject to its continued use, without express reservation to that effect, the parties are presumed to contract in reference to the condition of the property at the time of the sale; and neither has the right, by altering arrangements then openly existing, to change materially the relative value of the respecting parts—relying upon Jones on Easements, section 141.

The legal question, then, is, Does the law attach to the unqualified grant from Frazier to Boston of the ninety-three and fifty-four hundredths acres, which includes the whole of this passway, an implied reservation of the use of it for the benefit of the ninety and eleven hundredths acres which he still retained?

An examination of this question shows that: "There is a general concurrence of authority, both in England and in this country, in support of the proposition that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owner of the entirety for the benefit of the part granted; but upon the question whether, upon such a grant, the law will ingraft reservation of such easements in favor of the part retained by the grantor, the authorities, until quite recently, have been very conflicting." but the latter cases ¹⁰³ hold that, "if the grantor intends to reserve any right from the right of any tenements granted it is his duty to reserve it expressly in the grant, and to this the only exception

is ways or easements of necessity": See *Mitchell v. Scipel*, 53 Md. 262, 36 Am. Rep. 404, and cases cited; *Strohmier v. Leahy*, 10 Ky. Law Rep. 334, 9 S. W. 238.

All the text-writers and decisions have drawn a distinction between implied grants and implied reservations. Jones, in his work on Easements, discusses this difference in chapter 3, citing numerous decisions, and states the general rule to be that "where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part": Section 129.

But holds that "there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and, as a general rule, he cannot retain a right over a portion of his land conveyed absolutely only by express reservation. Thus, if a man makes a lane across one farm to another, which he is accustomed to use, and then conveys the farm without reserving a right of way, it is clearly gone. A man cannot, after he has absolutely conveyed his land, still retain the use of it for any purpose, without an express reservation. It is only in the cases of the strictest necessity that the principle of implied reservation can be invoked": Section 136.

104 The fact that one has been in the habit of using certain land in connection with his adjoining premises does not create an easement upon the first-named land, which, upon a conveyance of that land without words of exception or reservation, will be annexed to such other premises.

But there are numerous exceptions to this rule, and the author refers to the case of a man having a field, which he does not sell, in the midst of land which he sells. Of course, it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land; and a way over that is said to be a way of necessity, and that is reserved without express words, as implied reservation.

It seems to us, under the facts of this case, that at the time Frazier sold the land to appellee, if nothing had been said on the subject of a pass-way, the law would have implied a reserva-

tion of the existing notorious and open passway "as a way of necessity" for the benefit of the land reserved, but it is in proof that this very question was a matter of consideration between Frazier and appellee, and that Frazier expressly agreed to surrender all rights thereunder, and that appellee refused to purchase on any other condition. This testimony is not successfully contradicted or impeached, and it is not objectionable on the ground that it varies from the terms of the deed; but, on the contrary, it is not in conflict with the conveyance.

Mr. Jones, in his work on Easements (section 321), lays it down as a principle that "a purchaser is not entitled to a way of necessity in case he has agreed with his grantor, even verbally, not to claim a way."

And in the case of *Ewert v. Burtis* (N. J. Eq.), ¹⁰⁵ 12 Atl. 893, it was held that, "where a bill was filed to secure a way of necessity, it appeared that at the time of the purchase a way of necessity would have passed as an incident, except that the grantor refused to sell if the grantee was to have a right of way over his land; that the grantee declared there was no occasion for such right of way, because he could have one over a railroad company's lands to a highway; that the conveyance was made, and that the grantee had a license to pass over the railroad company's lands, which license was subsequently revoked. It was held that the court would not aid the complainant in establishing a way of necessity by issuing a preliminary injunction."

And certainly, if a purchaser could verbally waive a way of necessity by implied grant, there is much greater reason why a grantor, who seeks to retain a way of necessity by implied reservation, should lose his right of such way by verbal agreement with the purchaser. The permissive use of this passway by Frazier subsequently to his sale to appellee did not have the effect to vest in him any legal title thereto. The testimony shows that appellant has access to a public road over his lands in another direction, and certainly after the acquisition of the land the passway could not be claimed as one of necessity. But upon the whole case we are disposed to think that Frazier voluntarily surrendered his right to the passway over the land in question, and that appellant can have no higher or better right than belonged to him. For these reasons the judgment is affirmed.

Judge HOBSON (in response to a petition for a rehearing).
It is earnestly insisted by counsel for appellant in their pe-

tition for rehearing that parol evidence is inadmissible to show that at the time of the conveyance it was agreed ¹⁰⁶ between the grantor and the grantee that there was no necessity for the passway, as the grantor had another outlet to another pike and other ways to get out, and that it was then agreed that there was to be no passway over the land conveyed, and the deed was accepted only on this distinct understanding. Counsel insist that the passway, being an interest in land, can only be created or destroyed by a contract or agreement in writing, and that to admit the parol evidence referred to is to depart from those broad, fundamental principles of law that have been recognized for time immemorial. This would be true if the evidence infringed the terms of the deed, but that is not the case.

The grantor by his deed in this case conveyed to the grantee the whole boundary of land described in the deed. This passed the entire title to all within the boundary so described, from the center of the earth usque ad coelum, including the ground over which the passway ran. The passway was, therefore, included by the terms of the deed, and prima facie passed under it. But, as said in the opinion, the one exception allowed by the authorities in favor of a grantor where he has conveyed the fee of land "is ways or easements of necessity." And, as is well said by the learned author there quoted, "it is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, the principle of implied reservation can be invoked": Jones on Easements, sec. 136. Appellant's entire claim to the passway rests upon this doctrine of implied reservation. Whether this is a case of strictest necessity, where it would not be reasonable to suppose that the parties intended the contrary, the court can only know when the facts are shown by parol evidence. When these facts are shown by parol evidence, then the presumption of an implied ¹⁰⁷ reservation arises. But it is well settled that a presumption raised by parol evidence may also be rebutted by parol evidence. The rule is thus well stated in 3 Greenleaf on Evidence, section 366: "In certain cases of presumption of law, also, parol evidence is admitted in equity to rebut them. But here a distinction is to be observed between those presumptions which constitute the settled legal rules of construction of instruments, or, in other words, conclusive presumptions, where the construction is in favor of the instrument, by giving to the language its plain and literal effect, and those

presumptions which are raised against the instrument, imputing to the language *prima facie* a meaning different from its literal import. In the latter class of cases parol evidence is admissible to rebut the presumption and give full effect to the language of the instrument, but in the former class, where the law conclusively determines the construction, parol evidence is not admissible to contradict or avoid it."

In Wharton on Evidence, sections 973, 974, the same rule is fully stated and illustrated.

Though the terms of the deed *prima facie* convey the entire boundary, including the passway, parol evidence of the absolute necessity of the passway is admitted in this case to raise a presumption against the instrument, imputing to it a meaning different from its literal import. This presumption against the instrument may be rebutted by parol evidence, so as to give to its language its plain and literal effect. The proof offered by appellant to show the necessity of the passway might be rebutted by proof that it was unnecessary. It would not, perhaps, occur to counsel that parol evidence for the appellee showing that the passway was unnecessary would ¹⁰⁸ be inadmissible. But there is no better proof that it was unnecessary than the agreement of the parties at the time of the conveyance that the grantor had another outlet, and did not need this one. When he agreed it was not necessary, and not to reserve it, in order to induce the grantee to accept the deed, the estoppel may be shown by the same kind of evidence as the implied right.

Petition overruled.

A Way or Easement is generally extinguished by unity of title in the dominant and servient estates in the same person: Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Sereven v. Gregorie, 8 Rich. 158, 6 Am. Dec. 747. But see McCarty v. Kitchenman, 47 Pa. St. 239, 86 Am. Dec. 538; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398. And a subsequent sale of the servient tenement passes the land unburdened with the easement, unless it is expressly reserved in the conveyance: Hathorn v. Stinson, 10 Me. 224, 25 Am. Dec. 228. This doctrine does not apply, it seems, to an easement of necessity: Ferguson v. Witsell, 5 Rich. 280, 57 Am. Dec. 744.

NAPPER v. MUTUAL LIFE INSURANCE COMPANY.

[107 Ky. 134, 53 S. W. 28.]

DOWER—Voluntary Partition.—If lands are voluntarily partitioned between joint tenants, the inchoate right of dower of the wife of one of them attaches only to the land received by him under the deed of partition. (p. 341.)

JUDICIAL SALES—Unreleased Mortgage.—Although a mortgage has not been released of record at the time of a judicial sale of the land, this is no valid objection to the title, if such mortgage has been in fact paid and is not a subsisting lien upon the property. (p. 341.)

JUDICIAL SALES—Resale—Liability for Deficit.—If a purchaser at judicial sale refuses to execute a bond for the purchase price, the property may be resold and judgment rendered against him for the difference between his bid and the diminished amount of the price obtained on the resale. (p. 342.)

Chapeze & Halstead, for the appellant.

W. Mix and Strother & Gordon, for the appellee.

136 PAYNTER, J. Certain tracts of land belonging to J. M. Harned were sold under a judgment of the Bullitt circuit court to satisfy a judgment in favor of the appellee, Mutual Life Insurance Company of Kentucky. The appellant, Napper, became the purchaser, at the price of something over six thousand dollars, but refused to execute bond for the purchase money, as required by the judgment. The commissioner reported to the court the facts with reference to the sale of the property to the appellant, and the further fact that he had refused to execute bond for the purchase money. The appellee proceeded by rule against the appellant to obtain an order requiring him to execute the bonds for the purchase price of the lands, and that he be adjudged to be liable to the appellee for the amount of the purchase price, less the amount which the land should bring on a resale. To this rule the appellant filed a response, the sufficiency of which is involved on this appeal.

It appeared that the debtor, J. M. Harned, and his brother, J. H. Harned, became the owners, as joint tenants, through their deceased father, of certain tracts of land, and made a partition between themselves of the lands which they thus held. J. M. Harned took the land which was sold in these proceedings as his share, and the brother, J. H. Harned, took other lands, which they owned jointly. A deed of partition was

made, but the wife of J. H. Harned did not appear in the deed as a grantor, but she signed and acknowledged it. Therefore, it is contended that the title to the land was not perfect, because she had not relinquished her inchoate right of dower in the part which had been assigned to J. M. Harned. The wife had an ¹³⁷ inchoate right of dower in the land held jointly by the brothers. J. M. Harned could have gone into court, and asked and obtained a partition of the land, without the consent of his brother's wife, and without being required to make her a party to the proceedings, and the title to land assigned to him in such a proceeding would not be clouded, because she would take dower in the part which was assigned to her husband. If the land could be partitioned in the manner indicated, then the joint tenants could, by an agreement between themselves, avoid the necessity of a suit, and accomplish the same purpose. It is an incident to an estate in common that either tenant may be compelled to make partition. The wife of one of them, by her marriage, gains an inchoate right to dower, subject to such a contingency, by which her interest may be increased or diminished. This doctrine is supported by the opinions of many courts of last resort in the country: *Potter v. Wheeler*, 13 Mass. 504; *Lloyd v. Conover*, 25 N. J. 51; *Wilkinson v. Parish*, 3 Paige (N. Y.), 658.

We concede the claim of counsel for appellant that a widow may be endowed of an interest in land which her husband held as joint tenant: *Davis v. Logan*, 9 Dana, 185. But this does not militate against the views we have expressed.

It is not averred in the response that the Ricketts mortgage debt on the land had not been paid at the time the appellant became the purchaser of the property. It is, however, alleged that the mortgage had not been released or relinquished in any way "of record" in the clerk's office; but it may be true there had been no release of record of the mortgage; still, if the debt had been paid, it was not a subsisting lien upon the property. Besides, ¹³⁸ pending the proceedings, it was made to appear that the mortgage had been actually released. The land was not encumbered by the lien held by Michael Tewell, J. F. Mullins, Martha Mullins, and J. H. Harned. It was adjudged in *Harned v. Mutual Life Ins. Co.*, 21 Ky. Law Rep. 750, 53 S. W. 27, that the writing relied upon did not create a lien upon the property.

The judgment under which the appellant became the purchaser was rendered on proceedings had in this action against

a previous purchaser on sale bonds which he had executed, and it was done by notice and rule in this action. It is contended that the court erred in summarily rendering the judgment under which the sale was made. The parties were before the court in that proceeding, and the judgment was not void. This court has held that such a proceeding can be had. It was said in *Page v. Hughes*, 9 B. Mon. 115: "The chancellor has the power, after a failure of a purchaser of property sold by his order to pay for it, to order its resale, which may be for cash or on a credit, as the chancellor may deem most proper." It was said in *Lloyd v. Wagner*, 93 Ky. 653, 21 S. W. 337: "We see no reason why the chancellor could not resell the property. It left the securities in the purchase money bonds liable for any deficit, and it is the constant practice of courts of chancery to resell where the purchaser fails to pay."

We have noticed only such questions raised by the response as we deem necessary to be considered.

The judgment is affirmed.

Dower, After the Voluntary Partition of land held in cotenancy, is confined to the premises allotted to the husband: See monographic note to Gaffney v. Jefferies, 82 Am. St. Rep. 863, on the effect of partition on dower.

HOLMES v. HOLMES.

[107 Ky. 163, 53 S. W. 29.]

MISTAKE in the Execution of a Note as to the time of payment is not a good defense unless the maker thought that there was some stipulation in the note different from the real statements therein. (p. 345.)

VENDOR AND VENDEE—Rescission of Contract.—A vendee in undisturbed possession of land is not entitled to a rescission of his contract of sale, if the vendor is able and willing to convey a good title, unless time is of the essence of the contract. (p. 345.)

VENDOR AND VENDEE—Purchase from Married Woman—Rescission.—A vendee in possession under a deed from a married woman, though such deed is void, is not entitled to rescission if he is tendered a good and valid deed before the purchase money is fully paid. (p. 346.)

CONTRACTS with Married Women—Rescission.—A person contracting with a married woman is not entitled to relief from his contract, on the ground of want of mutuality, if it appears certain that under the facts he will not be exposed to loss or injustice by its enforcement, and it is impossible to place the parties in substantially the same condition that they were before the contract was made. (p. 346.)

J. T. Simon, for the appellant.

J. H. Barker, for the appellees.

¹⁶⁴ GUFFY, J. Amanda Holmes, a married woman, was the owner of two tracts of land in Pendleton county; and on the 18th of November, 1892, she sold and conveyed the same by warranty deed to the appellant, at the price of thirteen hundred and forty-seven dollars and eighty-one cents, five hundred and forty-two dollars and fifty cents of which was paid in hand, and two notes executed for the remainder due the 1st of March, 1894 and the 1st of March, 1895, respectively. The vendee entered upon and took possession of said land. It further appears that on December 24, 1894, the said Amanda Holmes, by writing, assigned said notes to the appellees, S. J. and J. R. Holmes, who, on the 6th of September, 1895, instituted suit in the Pendleton circuit court, seeking to recover judgment upon said notes, and for a sale of enough of the land aforesaid to satisfy the same. It further appears that before the institution of the said suit the said Amanda became discoverd, and was then a single woman. At the October term, 1895, of the court, the appellant filed his answer and cross-petition, in which it is alleged that at the time of the execution of the deed the said Amanda was a married woman, and that by mistake of appellant and her they thought she could make a valid deed, but that the deed passed no title to him, and that the notes are without any consideration.

It is further alleged that at the time of said conveyance and execution of the notes the agreement was that appellant should have as long a time to pay off and discharge said notes as he desired, and upon which condition he executed the same, relying upon the promise of his said mother to indulge him, and with said understanding he paid thereon four hundred and twenty dollars and sixty-six cents, and relying upon his said mother's promise, he did not require a writing to that effect.

¹⁶⁵ That said deed ought to be canceled and held for naught, as well as the notes, and the money paid to the said Amanda by him ought to be refunded, and the land ought to be sold to satisfy his claim therefor, if necessary. If this cannot be done, then the said notes ought to be reformed so as to express said contract between the parties. And he asked that the said Amanda be made a party to this suit.

On the 7th of January, 1896, the appellees filed an amended

petition, in which it is alleged that the said Amanda Holmes was a single woman at the time of the institution of this suit, and that on the 6th of November, 1895, she executed, acknowledged, and delivered to the appellant a new deed to said land in order to cure any supposed defect in the original deed; and they also asked that she be made a party to the suit. A copy of said deed is filed with the amended petition.

On the 14th of January, 1896, the said Amanda Holmes tendered her answer to the amended petition, and admitted the statements contained therein, and joined with the plaintiffs in tendering to the defendant the deed filed in said amended petition.

On January 14, 1896, the amended petition filed in vacation was noted of record; and the answer of Amanda Holmes was filed. It further appears that the partial demurrer of plaintiffs to the answer of defendant was sustained in so far as the answer set up an agreement to give defendant as much time as he desired to pay the notes in suit.

On the 23d of January, 1896, the appellant filed an amended answer and an answer to amended petition, in which it is alleged that by mistake of Amanda Holmes the stipulation in regard to giving the defendant further time than ¹⁶⁶ stated in the notes was omitted and not inserted in said notes, which stipulation was a part of the contract. He again relied upon the allegation that the deed was void and the notes without consideration, and asked for a rescission of the contract, and for an enforcement of the lien on the land for the said purchase money so paid by him. The answer also denied that the said Amanda Holmes by the execution of the said deed cured the defect that existed in regard to the land attempted to be conveyed. Says he does not accept the deed, and ought not to be required to do so after he filed his answer and cross-petition herein seeking a rescission of the contract, that he ought not to be compelled to take said land or pay therefor, and that the contract of sale was an unexecuted contract, and the parties thereto have no right to make a supplemental contract without his consent, and he declines to accept said deed. It is further alleged in the answer that at the time of the execution of the new deed, the said Amanda had not sufficient capacity to understand the effect of the instrument; that she is seventy-two years old, and has been in feeble health, and had become incompetent to manage her estate, from confirmed bodily infirmity and weight of age. The demurrer was sustained to the

first paragraph of the petition, and overruled as to the others. The reply may be considered as a traverse of the affirmative allegations of the answer. The court upon final hearing rendered judgment in favor of plaintiffs for the amount claimed, and adjudged to them a lien upon the land in contest to secure the same, and adjudged a sale of enough thereof to pay the judgment aforesaid, and pursuant thereto the land was sold, and appellant's exceptions to the report of sale were considered and overruled by the court; and from these judgments appellant prosecutes this appeal.

¹⁶⁷ We are of opinion that the exceptions to the report of sale were properly overruled, and it seems clear to us that the appellant failed to show want of capacity upon the part of Amanda Holmes to understand and execute the deed tendered with the amended petition.

The demurrer to so much of the answer as attempted to plead a mistake was properly sustained. It nowhere appears that the appellant thought that there was any stipulation in the notes different from the real statements therein.

It is, however, insisted for appellant that inasmuch as the original deed passed no title to him, on account of the coverture of the vendor, the contract was absolutely void, and that it could not be enforced against the vendor, and, this being true, he insists that it cannot be enforced as against him.

It may be true that such contracts of a married woman are void and not susceptible of ratification.

This record discloses the fact that the vendor is the mother of appellant, and that he had the undisputed possession and control of the land from the time of sale to the institution of this suit, and it does not appear that anyone was disputing his title, or likely to do so.

It further appears that as soon as he manifested any dissatisfaction with his conveyance a perfect title was made and tendered to him.

It is said in *Logan v. Bull*, 78 Ky. 608, that the modern rule is that, although the title may be in the wife when the contract is made with the husband, if the latter is ready to comply by tendering such a conveyance as will pass the title the chancellor will adjudge a specific performance.

We have not been referred to any case where the ¹⁶⁸ vendee in the undisturbed possession of the land was adjudged a rescission, if the vendor was able and willing to convey a good title, unless time was of the essence of the contract.

It is suggested that this case does not come within the rule announced, for the reason that the contract was not enforceable against the vendor, but we are of opinion that such a contention is not tenable in this case. It is manifest that the appellant was cognizant of all the facts. He knew that his mother was a married woman at the time of the purchase, and is presumed to know the law; and as, before remarked, he had undisturbed possession of the land, and made no objection to the title until payment of the residue of the purchase money was attempted to be enforced.

We know of no case in which a rescission has been adjudged under substantially the same conditions surrounding this case. Substantially the same question involved in this case was decided by the supreme court of Iowa in *Chamberlain v. Robertson*, 31 Iowa, 408. In that case an executory sale had been made of real estate to a married woman. It could not have been enforced as to her on account of her coverture, but she sought a specific enforcement of the contract. The vendor sought to avoid the contract on account of the lack of mutuality. But Beck, J., said in the opinion in that case that in no case will a person contracting with a married woman be relieved from his contract on the ground of want of mutuality, if it appears certain that under the facts of the case he will not be exposed to loss or injustice by its enforcement.

It is further said in the opinion *supra*: "The disability of a married woman, whereby she is exempted from ¹⁶⁹ the obligation of her contracts, is not created by the law for the benefit of those who contract with her, but for the protection of herself and husband."

Moreover, it seems impossible in this case to place the parties in substantially the same condition that they were before the sale was made. It would therefore be inequitable to adjudge a rescission in this case.

Judgment affirmed.

The Vendee may Rescind a contract for the sale of land if the vendor is unable to convey the title contracted for: Smith v. Lamb, 26 Ill. 396, 79 Am. Dec. 381; Wilhelm v. Fimple, 31 Iowa, 131, 7 Am. Rep. 117; Burks v. Davies, 85 Cal. 110, 20 Am. St. Rep. 213, 24 Pac. 613. However, a defect in the title when the contract is made is no ground of objection thereto, if removed before the time fixed for completing the purchase: Gregory v. Christian, 42 Minn. 304, 18 Am. St. Rep. 507, 44 N. W. 202. But see Burks v. Davies, 85 Cal. 110, 20 Am. St. Rep. 213, 24 Pac. 613. And a grantee of land conveyed with a warranty has a remedy upon the covenants of his deed for a failure of title; and if a perfect title is tendered before a decree

is rendered, the contract will not be rescinded, unless the grantee has sustained damage by reason of the delay in perfecting the title: *Bradfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 11. Equity may enforce the specific performance of a contract for the sale of lands, although the vendor may have had no title at the time of the sale, if he can make a good title at the time of the decree: *Mason v. Caldwell*, 5 Gil. 196, 48 Am. Dec. 330; *Seymour v. Delancy*, 3 Cow. 445, 15 Am. Dec. 270.

MEYLER v. WEDDING.

[107 Ky. 310, 53 S. W. 809.]

STATES.—Concurrent Jurisdiction on the Ohio River, as granted by the eleventh section of the "compact" between Kentucky and Virginia, means only that states thereafter formed shall have concurrent legislative jurisdiction for the purpose of navigation, and it does not confer jurisdiction for the service of civil process. Hence, the concurrent jurisdiction of Kentucky and Indiana over the Ohio river is legislative only, and the courts of Indiana have no civil jurisdiction beyond the territorial limits of that state, which extend only to low-water mark on the Indiana shore of such river. (p. 355.)

STATES—Jurisdiction of—Boundaries.—The jurisdiction of the state of Kentucky extends to low-water mark of the Ohio river on the Indiana side, and a judgment of an Indiana court rendered upon service of process on the Ohio river on the Kentucky side of low-water mark is void in Kentucky, though the Indiana courts claim concurrent jurisdiction with those of Kentucky over the Ohio river forming the boundary between them. (p. 356.)

R. J. Meyler and Wright & McElroy, for the appellant.

J. B. Rodes, B. Renfrow, L. I. Ahlering, J. W. Ray, of Kentucky, W. L. Taylor, attorney general, M. Morris, and C. C. Hadley, of Indiana, for the appellees.

313 **WHITE, J.** This action was instituted on a judgment of the superior court of Vanderburg county, Indiana. Appellant Meyler defended upon the ground that the court rendering the judgment did not have jurisdiction to render the judgment. The answer admits that on May 27, 1896, the sheriff of Vanderburg county, Indiana, handed to appellant a summons directing appellant to appear before the judge of the superior court of the county of Vanderburg on or before June 8, 1896, to answer a petition of appellees. The answer, however, alleges that this delivery was made in the county of Henderson,

this state, and that there was no service of any kind had in the county of Vanderburg. The answer further alleges that appellant did not appear in person or by attorney in that action at any time, nor was there ever a trial of the action on the merits. Appellant also denied any indebtedness to appellees on any account whatever. The allegations of the answer were denied by reply. The issue presented was tried before a jury, who were instructed to return special findings, two in number.

The first question submitted is: "When the summons in this case was served upon defendant Meyler ³¹⁴ on the Ohio river, was said Meyler on the Indiana or Kentucky side of the low-water mark of said river where it touches the Indiana shore?" The jury answered: "On the Kentucky side of the low-water mark."

Question 2: "Did defendant Meyler authorize J. E. Williamson to represent him as his attorney for any purpose in the superior court of Vanderburg, Indiana, in the suit of L. C. Wedding etc. v. R. J. Meyler? If so, what was the nature and extent of the authority thus given?" The jury answered: "We do not believe R. J. Meyler authorized J. E. Williamson to represent him as his attorney."

The proof showed that summons was served on appellant by the sheriff of Vanderburg county while appellant was on a steamboat in the Ohio river, and also that appellant never in person appeared in that court. Appellees moved for judgment, notwithstanding the special findings by the jury, and the appellant moved for a judgment of dismissal on the findings. The court sustained the motion of appellees, and rendered judgment for the amount of the judgment of the Indiana court. After appellant's motion for a new trial had been overruled, he appeals.

By the proof and special findings of the jury, it appears that appellant did not enter his appearance to the action in Indiana either in person or by attorney, and that at the time summons was served on appellant he was outside of low-water mark on the Indiana shore of the Ohio river, and, of necessity, within the territorial limits of the county of Henderson, Kentucky: *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 194; *McFall v. Commonwealth*, 2 Met. (Ky.) 394; *Handley v. Anthony*, 5 Wheat. 374.

However, it is insisted by counsel for appellees, and evidently this view was held by the trial court, that, although ³¹⁵ the state of Kentucky owns the soil to low-water mark on the

northwestern shore of the Ohio river, the jurisdiction over the river is concurrent in the states bordering thereon; and it is insisted that, by the eleventh section of the enactment known as the "Compact with Virginia," the states north and west of the river have jurisdiction concurrent with Kentucky over the river.

In *McFall v. Commonwealth*, 2 Met. (Ky.) 394, this court said: "The word 'jurisdiction,' as applied to a state and as used in the Compact with Virginia, imports nothing more than the power to govern by legislation; and, without legislative enactments to enforce and carry out the jurisdiction so conferred, it cannot, of itself, be regarded as operative, or effectual to protect the appellant, or to defeat the right of our own tribunals to enforce and execute our own penal and criminal statutes."

Section 221 of the constitution of the state of Indiana, read as evidence, provides, as the boundary of the state, "on the south by the Ohio river from the mouth of the Great Miami river to the mouth of the Wabash river, on the west by a line drawn along the middle of the Wabash river from its mouth to a point where a due north line drawn from the town of Vincennes would last touch the northwestern shore of said Wabash river."

Section 222 of the constitution reads: "The state of Indiana shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section, and shall have concurrent jurisdiction in civil and criminal cases with the state of Kentucky on the Ohio river, and the state of Illinois on the Wabash river so far as said rivers form the common boundary between this state and said states respectively."

The record shows that the superior court of Vanderburg **316** county that rendered the judgment had jurisdiction of the subject matter of that action. The only question, therefore, that arises on this appeal is. Did that court acquire jurisdiction of the person of appellant by the service of the summons on him while he was afloat on the river, and south of low-water mark?

Section 11 of the Compact with Virginia 13 Hen. St. Va., p. 19), reads: "7. That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as afore-

said, shall be concurrent only with the states which may possess the opposite shores of the said river."

It appears by the constitution of the state of Indiana, *supra*, that that state has exercised legislative jurisdiction over the river of Ohio, and therefore is entitled to the full benefit of the act of Virginia commonly called "Compact," *supra*.

We are referred in brief of counsel for appellees to several decisions of the supreme court of Indiana, wherein it is held that that state has concurrent jurisdiction with this state over the river Ohio. We are also referred to decisions of the states of Ohio and Virginia as holding that, by the Compact with Virginia, *supra*, the jurisdiction over the river Ohio is concurrent.

The Virginia court, in *Commonwealth v. Garner*, 3 Gratt. 655, seems to have held that the Virginia court did not have jurisdiction to try Garner for an offense against the laws of Virginia, committed while standing in the water above low-water mark on the Ohio shore; the court holding that ³¹⁷ the act was committed beyond the territory of the state, although in the water, a minority of the court being of opinion that Virginia jurisdiction and territory extended to the top of the bank on the Ohio side. In a subsequent case, the West Virginia supreme court held the view of the minority in Garner's case, and claimed jurisdiction over the entire river, although the vessel was tied to the Ohio shore: *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211.

The subject of concurrent jurisdiction between states bordering on a river has frequently come up for adjudication throughout the Union. In 1816 an act was passed by the legislature of Virginia permitting the erection of a bridge across the Ohio river at Wheeling. That privilege was extended by acts till 1847. In 1849 the state of Pennsylvania brought an action in the supreme court of the United States, seeking an injunction against the maintenance of the bridge, because the same obstructed navigation. The court, on preliminary hearing (*Pennsylvania v. Wheeling etc. Bridge Co.*, 9 How. 647), made an order appointing a commissioner to take proof as to the obstruction, if any, by the bridge. Subsequently *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 518, upon final hearing, it was adjudged that the bridge obstructed navigation, and would have to be removed or raised, and an order was entered to that effect. In the opinion rendered in that case, it was admitted that there was ample authority to erect a

bridge; that the act of the Virginia legislature gave ample authority, but that the bridge obstructed navigation, and thereby violated its charter, even were it not for the acts of Virginia ceding to the whole people the free and unobstructed navigation of the Ohio river.

The case was again before the court in *Pennsylvania v. Wheeling etc. Bridge Co.*, 18 How. 421. ³¹⁸ It there appeared that subsequently to the former opinion Congress had declared the bridge not to be an obstruction to navigation, and had provided that all vessels should be so regulated as not to interfere with the bridge. The former order (*Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 518) was annulled.

The court said: "We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government."

By the compact entered into between the states of New Jersey and Pennsylvania in 1783, it is declared that the river Delaware, in the whole length and breadth thereof, is and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the contracting parties, and that each state shall enjoy and exercise a concurrent jurisdiction within and upon the water between the shores of said river: *Attorney General v. Delaware etc. R. Co.*, 27 N. J. Eq. 631. This concurrent jurisdiction was held to mean that neither state could, without the consent of the other, grant exclusive privileges on the river: *President etc. River Delaware Bridge v. Trenton City Bridge Co.*, 13 N. J. Eq. 46. It was conceded that the boundary was the center of the stream.

³¹⁹ In the case of *Attorney General v. Delaware etc. R. Co.*, 27 N. J. Eq. 631, the court, after quoting from *President etc. River Delaware Bridge v. Trenton City Bridge Co.*, 13 N. J. Eq. 46, says: "The practice thus mentioned shows that the legislature has usually, when exercising its concurrent jurisdiction, under its interstate agreement, with the view of provid-

ing for the construction of bridges over this river, employed language that imported an authority to cross the river from shore to shore. And justly, too; for though its authorization was not alone sufficient, as it has not exclusive jurisdiction, yet, as it possessed jurisdiction of some sort over the whole of the waters, for the purpose of guarding the common highway, its permission was needed throughout by whomsoever claimed the right to interfere at all with this public privilege. Hence it is a perfectly proper use of language to speak of the railroads of New Jersey as crossing the Delaware under the sanction of her laws."

The constitution of the state of Wisconsin (article 9, section 1) declares: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state, so far as such rivers or lakes shall form a common boundary to the state, and any other state or territory now or hereafter to be formed, and bounded by the same."

This same provision is also found in the constitution of Minnesota, and is also contained in the enabling acts authorizing the two states. The legislature of Minnesota chartered the St. Croix Boom Corporation, and authorized it to erect booms in the river St. Croix. This was done on that part of the St. Croix river forming a part of the boundary line between the states of Wisconsin and Minnesota. There was no similar grant by the state of Wisconsin. In an action for damages, in which the boom corporation justified under its authority from Minnesota, ³²⁰ the supreme court of Wisconsin held, in a very elaborate opinion, that the state of Minnesota had power, under its concurrent jurisdiction clause, to grant the charter, at least as to its half the river: *J. S. Keator Lumber Co. v. St. Croix Boom Corporation*, 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529.

Among other things, that court said, in discussing the opinion of the United States supreme court in the *Wheeling etc. Bridge Co. Case*, 18 How. 421: "It must be conceded, however, that the power and jurisdiction of Virginia over the half of the river most distant from it was greater than it otherwise would have been, by reason of the terms and conditions upon which it parted with its title to the territory northwest of the Ohio."

There are numerous cases where the question of concurrent jurisdiction, as applied to rivers forming a boundary line between states, has arisen, and in these cases it has been almost

universally held that that provision in the several compacts and acts means legislative jurisdiction to control the river, and the free use thereof, for purposes of navigation. However, we are not without authority as to the jurisdiction of the states as regards civil and criminal jurisdiction of its courts over the rivers forming boundary lines.

The river Mississippi is the boundary line between the states of Iowa and Illinois, and, by an act of the legislature of Iowa, the Mississippi and Missouri Railroad Company was authorized to erect a bridge on the river at Rock Island, and, by a like act of the state of Illinois, the Chicago and Rock Island Railroad Company was authorized to bridge the Mississippi river at Rock Island. Under the two legislative acts a bridge was built—one entire structure, consisting of six piers with a draw. There were three piers ³²¹ on the Iowa side of the middle of the river, and likewise three piers on the Illinois side. One Ward, the owner of a line of steamboats running on that part of the river between St. Louis, Missouri, and St. Paul, Minnesota, brought his action in the United States court for the district of Iowa, seeking to have the bridge removed on the ground of a public nuisance, as an obstruction to the free navigation of the river. The case went to the supreme court, and was there decided: *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 485. The court said: "The constitution of Illinois calls for the middle of the Mississippi river as the western boundary of that state, and, as Iowa was admitted into the Union after Illinois, a line in the middle of the river is the dividing line between the states. The complainant sued in the federal court because of his citizenship in a different state from the defendant; and the United States district court holden in Iowa could have exercised the same jurisdiction that a state court of Iowa could have exercised and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa and its piers the court below acted, and ordered that the structure should be removed. . . . It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he founds his right to sue the Iowa corporation, and to proceed against the bridge in rem as a public nuisance. An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of Illinois, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats, giving him the

privilege to sue and abate the obstruction, was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks ³²² to remove a local object, because he has sustained special damage from that object. The district court had no power over the local object inflicting the injury, nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside the case."

This position taken by the court as to jurisdiction is emphasized by a dissenting opinion of Mr. Justice Nelson, concurred in by Justices Wayne and Clifford. The dissenting opinion does not claim jurisdiction for the court of Iowa upon any concurrent idea, but, as said, "upon much higher and broader ground. The right to a free and unobstructed navigation of this river on the part of the public, and especially of the citizens of the United States, depends upon the constitution and the laws of the United States—the public law of the country": Mr. Justice Nelson's dissent, *Mississippi etc. R. R. Co. v. Ward*, 2 Black, 497.

The enabling act of the state of Illinois (3 Stats. 429, sec. 2), says: "Provided, also, that the said state shall have concurrent jurisdiction with the state of Indiana on the Wabash river, so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river, with any state or states to be formed west thereof, so far as said river shall form a common boundary to both."

The enabling act of Iowa provides (5 Stats., 743, sec. 3): "And be it further enacted that the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state and any other state or states now or ³²³ hereafter to be formed or bounded by the same; such rivers to be common to both."

Thus it is clear that, by the very highest authority, the states of Iowa and Illinois were given concurrent jurisdiction over the river Mississippi: yet, by the decision of the supreme court, it was held that the courts of Iowa could not exercise jurisdiction beyond the middle of the river—its boundary.

It is noticeable that, in the enabling act of Illinois, that state is guaranteed concurrent jurisdiction over the rivers Mississippi and Wabash; yet as to the river Ohio, forming a part of its boundary, the same as that river forms a part of the boundary

of Indiana—low-water mark on the northern shore—there is no mention of concurrent or other jurisdiction.

In the enabling act of Indiana (3 Stats., 289, sec. 2), it reads: "Provided, also, that the said state shall have concurrent jurisdiction on the river Wabash with the state to be formed west thereof, so far as the said river shall form a common boundary to both." The only authority under which Indiana can claim concurrent jurisdiction over the river Ohio is by reason of the Compact with Virginia. That part of the compact relating to the river Ohio and jurisdiction thereon is section 11, *supra*.

The concurrent jurisdiction therein guaranteed to the states owning the northwestern shores of the river Ohio has always been considered by the state of Illinois to be legislative only, and that state has never, so far as we are informed, assumed to its courts jurisdiction beyond its territorial limits. The rights of the state of Illinois must be the same as of the state of Indiana.

We are of opinion, clearly, that concurrent jurisdiction, as granted by the Compact with Virginia, meant only that ³²⁴ the states should have legislative jurisdiction. This was done, as it seems to us, to insure to each state, and to the citizens of the United States, the free and unobstructed navigation of that river. In other words, concurrent jurisdiction was given and retained, so that neither state, against the wish of the other, or without the consent of the other, could authorize the construction of a bridge across the river, and so that each state could grant ferry privileges and wharfing privileges, and regulate fishing therein, and such other rights common to both, and necessary to be under a common supervision of both, to make the waters of the river Ohio a common, public, free and unobstructed highway for purposes of navigation. It is a universal rule that the jurisdiction of all states is limited by their territorial boundaries. To make an exception to this rule requires an express stipulation. It is against all rules and precedent of law to grant to another state jurisdiction over the territory of a state, and if it be conceded that it can be done, it will never be by implication. If any grant be made, it should always be held to be the least power that the words of the grant covers.

We realize that the courts of Indiana claim concurrent jurisdiction over the river Ohio, and that our opinion here is in conflict with that of the supreme court of Indiana; but we prefer

to follow the opinion of the supreme court of the United States in this matter, especially when it agrees with our ideas on the subject: *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189.

The constitution of Indiana, under which this concurrent jurisdiction is claimed, only gives or declares jurisdiction on the Ohio "so far as said rivers [Ohio and Wabash] form the common boundary between this state and said states respectively." The Wabash river forms ³²⁵ the common boundary between the states of Indiana and Illinois, and, by the enabling acts of both states, concurrent jurisdiction is given over the Wabash. The Ohio river is not the common boundary between the state of Indiana and this state. The boundary line is low-water mark on the northwest, or Indiana side: *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. Rep. 1051. So that, if the letter of the constitution of Indiana be looked to alone, it does not declare that the courts of that state have jurisdiction, except on rivers forming the common boundaries thereof, which cannot, and does not, include the river Ohio. We are therefore of opinion that the superior court of the county of Vanderburg, Indiana, did not acquire jurisdiction of the person of appellant by the service of summons on him while on the river and on this side of low-water mark, and by the verdict of the jury this was all the service ever had on appellant. The judgment sued on is therefore void, and judgment upon the verdict should have been rendered for appellant.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to render judgment on the verdict dismissing the action, and for proceedings consistent herewith.

The whole court sitting.

Mr. Justice Du Belle filed a separate concurring opinion, and, after quoting the eleventh section of the "Compact" between Virginia and Kentucky, gave the following additional reasons in support of the decision in the principal case. He said, in effect, that when Virginia granted to the general government the territory northwest of the Ohio river, "it retained the territory as far as low-water mark on the northern side, and consequently retained all jurisdiction to that boundary, for jurisdiction follows boundary. By the compact, the soil as far as that boundary was ceded to Kentucky, and jurisdiction as far as that boundary went with the grant of the territory, except in so far as jurisdiction may have been reserved in the grant. The compact was approved December 18, 1789, by both states. By laws enacted in 1791-92,

Kentucky was admitted into the Union as a state, according to the provisions of the Compact. By the terms of the grant, which were simultaneously accepted by the grantee, it was provided: 1. That the navigation of the river, so far as the territory of the proposed state or the territory remaining within the limits of the grantor lies thereon, shall be free and common to the citizens of the United States; and 2. That the respective jurisdictions of Virginia and Kentucky on the river should be concurrent only with the states which may possess the opposite shores of said river. This does not mean at all the same thing as a provision that the jurisdictions should be only concurrent with such states. That would be a limitation upon the jurisdiction which Kentucky acquired by the Compact. The language used is a stipulation that no other body politic, except those states possessing opposite shores, should be permitted to have concurrent jurisdiction with Kentucky over the river. It was an agreement that the general government, to which the Northwest Territory had just been ceded, should not have, in exercising territorial government over that domain, concurrent jurisdiction with Kentucky over the river. The jurisdiction was to be concurrent only with such states as might thereafter possess the opposite shores. This was not a limitation upon Kentucky's jurisdiction. It was an inhibition against parting with it. It gave the territory, and with it the jurisdiction, to low-water mark on the northern shore. And it provided that Kentucky should not cede concurrent jurisdiction over the river to the United States, exercising territorial government over the Northwest Territory, or to any other state than those which might possess the opposite shore.

"Where, then, do the states to the north of the Ohio obtain jurisdiction, if this construction of the compact be correct? Jurisdiction by one sovereign over territory admitted to be the property and within the boundary of another is not to be lightly implied, and surely not from language so vague and uncertain as that used in the compact upon this point. . . .

"A claim of jurisdiction by one state over the land of another must be supported by some grant, or the claim fails. Kentucky has never granted to Indiana any jurisdiction over the Ohio river, concurrent or otherwise. It is beyond her power, as limited by the constitution, to do so: U. S. Const., art. 1, sec. 10. If such jurisdiction in Indiana exists, it must be by virtue of the language of the compact, which to that end must be construed as creating a sort of springing use of jurisdiction for the benefit of states unborn. No stretch of construction can avail to extract from the language of the compact an implication which will give to a state not a party to the instrument, and not in being at the time of its execution, jurisdiction over the territory and within

the boundary of another sovereignty, so as to authorize the grantee by implication to serve process and make arrests upon the territory of the other, and try offenders for acts committed upon foreign soil, or to impose penalties for acts which are not prohibited by the owner of the territory.”

Mr. Justice Hobson filed a dissenting opinion, concurred in by Mr. Justice Burnam, in which it was asserted that under the Compact, before referred to, between Virginia and Kentucky, concurrent jurisdiction is vested in Kentucky and Indiana on the Ohio river, regardless of low-water mark, both for the purposes of navigation and for the purpose of the service of process, both civil and criminal. In support of his views, Mr. Justice Hobson said:

“At common law, the respective jurisdictions on either side of a highway were concurrent on it. This rule, which the experience of ages had confirmed as necessary to secure peace and protect life and property among their ancestors, was well known to the people of Virginia; and the great statesmen who controlled her affairs intended to establish the same rule for the highway which had hitherto been exclusively within the jurisdiction of Virginia. Had it been intended by Virginia to retain her jurisdiction as it then stood, there was no need to mention in the act that part of the river which it left within her territory. And if it had been intended to confer upon Kentucky exclusive jurisdiction to low-water mark on the northern shore, there was no need to mention the states possessing the opposite shores, for this jurisdiction would have passed with the grant of the soil.

“The restriction of the concurrent jurisdiction to the states possessing the opposite shores is of necessity a grant of concurrent jurisdiction to both of them, for the exclusion of all others is by necessary implication an inclusion of these states. It cannot fairly give one of them an exclusive jurisdiction. The purpose of the act was to enable the states on both banks to protect their people from the evil-minded on the river, which was made a common highway for everybody. The natural meaning of the words is that ‘the respective jurisdictions’ of Virginia on the river as they then existed should continue in Virginia and Kentucky, and be exercised by them concurrently with the states possessing the opposite shores. The clause in question is, by the express terms of the act, made a condition of the grant of the territory to Kentucky. By plain terms, the respective jurisdictions of Virginia and Kentucky on the river are placed on the same footing as the respective jurisdictions of the states opposite them. . . .

“There is greater reason for the concurrent jurisdiction on the river where the low-water mark on one side is the line between the states than where the line is at the center of the stream, for the

reason that the state holding to the water edge at low water mark on its side of the stream would otherwise be practically at the mercy of wrongdoers on the river, and the policing of the stream would be a burdensome tax in many cases on the other state, with little corresponding benefit. Indiana has on the shores of the Ohio the cities of Evansville, New Albany, Jeffersonville, Madison, Lawrenceburg, Aurora, Mount Vernon, Rockport, Vevay, Cannelton, Leavenworth and a number of smaller towns. Concurrent jurisdiction is a practical necessity in the administration of government on the river. Otherwise the police boats maintained by these cities will be no protection. A thief can sit alongside the wharf boat in open possession of stolen goods and the entire people on the north shore of the river will be utterly unable to protect their harbors, landings or wharfs or other property from the army of river tramps here to-day, gone to-morrow, leaving no trace behind and only known to have been present from the stolen valuables that are not to be found.

"It is said that what is lawful on one side of the river may be unlawful on the other, or punished differently. But the same may be true where the center of the stream is the dividing line, and universal experience has vindicated the wisdom of the rule giving both states concurrent jurisdiction in such cases.

"In many years, no practical inconvenience has resulted from the concurrent jurisdiction exercised by Kentucky and Indiana on the river, and there is no reason for the apprehension of trouble in the future that may not be settled by the principles applied in other cases of conflict of laws. The two states have concurrent jurisdiction on the river, and neither can by its laws impair or control the jurisdiction of the other. The courts of the state first acquiring jurisdiction of the cause and the parties will retain it, and the courts of the other state will not interfere.

"No question of conflict of law arises in this case. The only question is, whether the judgment of the Indiana court is void for want of jurisdiction because the process on which it was based was served on the Ohio river.

"For the reasons indicated, it seems to me the court below properly held the judgment valid, and that the construction now adopted by this court for the first time, over a century after the act was passed, denies it fair effect and is unwarranted by the authorities. I therefore dissent from the judgment of the court."

The following cases were cited in support of the views expressed: *Wiggins Ferry Co. v. Redding*, 24 Ill. App. 265; *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 Blackf. 280; *Carlisle v. State*, 32 Ind. 55; *Dugan v. State*, 125 Ind. 130, 25 N. E. 171; *Welsh v. State*, 126 Ind. 71, 25 N. E. 883; *Gilbert v. Moline etc. Mfg. Co.*, 19 Iowa, 319; *State v. Mullen*, 35 Iowa, 199; *Church v. Chambers*,

3 Dana, 274; *Arnold v. Shields*, 5 Dana, 22, 30 Am. Dec. 669; *McFall v. Commonwealth*, 2 Met. (Ky.) 394; *Opsahl v. Judd*, 30 Minn. 129, 14 N. W. 575; *State v. George*, 60 Minn. 505, 63 N. W. 100; *Sanders v. St. Louis etc. Anchor Line*, 97 Mo. 26, 10 S. W. 595; *State v. Metcalfe*, 65 Mo. App. 681; *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211; *State v. Cameron*, 2 Pinn. 490; *J. S. Keator Lumber Co. v. St. Croix etc. Co.*, 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529; *Handly v. Anthony*, 5 Wheat. 377.

The Boundary Between the States of Illinois and Missouri is the thread of the main stream of the Mississippi: Bittenuth v. St. Louis Bridge Co., 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439. While Wisconsin and Minnesota have, by their constitutions, concurrent jurisdiction over the St. Croix river, forming the boundary between them: *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529. And West Virginia has jurisdiction of a crime committed on a vessel on the Ohio river, within low-water mark, opposite the territory of the state, although moored to the bank within the boundaries of the state of Ohio: *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211.

RHODES v. COMMONWEALTH.

[107 Ky. 354, 54 S. W. 170.]

TRIAL—Improper Remarks of Counsel.—It is reversible error to permit the prosecuting attorney, in arguing a case to the jury, to state facts which do not appear in the record, and to accuse the defendant of offenses for which he is not being tried, evidence of which would not be admissible on the trial. (p. 361.)

TRIAL—Improper Argument of Counsel.—On a trial under an indictment for maintaining a bawdy-house, it is reversible error to permit the prosecuting attorney to state in his argument to the jury that "the business of the defendant, in this town is to rent and furnish bawdy-houses, and he makes his living by public bawdry and public shame; he is an old offender; he knows the law; he has been to the penitentiary, and you should not believe him under oath." (p. 361.)

J. Y. Brown and J. H. Eaton, for the appellant.

W. S. Taylor and C. J. Pratt, attorneys general, and L. C. Flournoy, commonwealth's attorney, for the appellee.

354 PAYNTER, J. The appellant, Rhodes, was tried under an indictment for maintaining a bawdy-house. In the trial of the case he sought to show that the title to the property was in

355 another, and in support of that tendered a deed. The deed had never been delivered and accepted. In arguing the case before the jury, over the objection of the appellant, the commonwealth's attorney used language as follows, to wit: "The business of the defendant Rhodes in this town is to rent and furnish bawdy-houses, and he makes his living by public bawdy and public shame. He is an old offender, he knows the law, he has been to the penitentiary, and you should not believe him under oath."

Under our constitution a person accused of an offense is entitled to trial by jury, conducted according to the rules of law. The court should only permit the jury to hear relevant and competent facts. The accused is entitled to fair treatment by the judge who presides over the court, and by the commonwealth's attorney, who is a sworn officer of the law. Jurors believe that commonwealth's attorneys are interested in the conviction of persons guilty of offenses, and their statements of necessity have great weight with them. A commonwealth's attorney, in arguing a case to the jury, should not be permitted to state facts which do not appear in the record, or be permitted to accuse a defendant of offenses for which he is not being tried. He charged that the appellant's business was to rent and furnish bawdy-houses; that he made his living by public bawdy and public shame; that he is an old offender. The defendant was under trial for being guilty of maintaining a bawdy-house on a certain street in Henderson. It was not even competent on the trial of the case to prove that he rented and furnished other bawdy-houses, etc.

We are of the opinion that the commonwealth's attorney greatly transcended his duties in making the charge which he did against the defendant, and for that reason the case is reversed.

Misconduct of Counsel in Argument, when so seriously improper as to call for a reversal of judgment, is considered in the monographic note to McDonald v. People, 9 Am. St. Rep. 559-570; State v. Blackman, 108 La. 121, 32 South. 334, post, p. 377, and cases cited in the cross-reference note thereto. '

BALDWIN v. PHOENIX INSURANCE COMPANY.

[107 Ky. 356, 54 S. W. 13.]

INSURANCE.—Parol Contract to Renew a policy of insurance made before the expiration of the old policy is valid, though nothing is said or done about the premium, if the parties have dealt together for years and know the rate of premium and the insurance agent has habitually given credit for the premium and has collected it on demand. (p. 364.)

J. M. Benton, for the appellant.

Beckner & Jouett, for the appellee.

357 PAYNTER, J. The question involved in this case is whether a parol agreement to renew an existing policy of insurance when it shall expire is valid. The averments of the petition which we deem necessary to consider are substantially as follows: That from September 1, 1894, to September 1, 1895, the appellant held a policy of insurance in the appellee company, for which he paid an annual premium of twenty dollars; that the appellee insured him against loss by fire to the amount of eight hundred dollars on a stock of leaf and manufactured tobacco, and on September 1, 1895, the appellee, through its agent, George W. Strother, issued to him a renewal policy, which extended to September 1, 1896, for which he paid a like premium as for the first policy; that on April 7, 1896, the appellee gave him written permission to remove the tobacco covered by the policy to another building, near the one in which the tobacco was originally stored; that he removed the tobacco to the building where he was permitted to do so by the appellee; that Strother is, and has been continuously for several years, in charge of the appellee's business at Winchester, and had full authority to make contracts of insurance, to issue policies and renewals of same; that on April 7, 1896, the appellee, through Strother, its agent, agreed with the appellant that, in consideration of the usual annual premium paid by him for the policy of insurance, to wit, twenty dollars, his policy was to be renewed upon its expiration, September 1, 1896, for a year, upon the same terms and conditions as contained in the existing policy; that for several years prior thereto appellant had been insuring his property with the appellee and other companies represented by Strother, all of which insurance had been effected through Strother as agent; that

Strother, during ³⁵⁸ all that time, had never required of appellant payment of the premium at the time the policies were issued, but made a charge of premiums against him on his books, and afterward, at such times as he desired to collect the premiums from him, would present an account for same and receive payment; that because of that course of dealing upon the part of Strother he had not, by September 1, 1896, paid the premium for the renewal of the policy; that he was able and willing to pay the premium on the day that the renewal should have been issued, and every day thereafter, upon the demand of Strother; that Strother failed to issue a renewal policy as he agreed to do; that on the night of November 2, 1896, his stock of tobacco, which was insured, was destroyed by fire, resulting in his loss in the sum of four hundred and sixty-nine dollars; that he relied upon Strother's agreement to renew the policy; that he did not know that Strother had failed to renew it for another year until after the fire had occurred; that he then tendered the premium of twenty dollars, and Strother refused to accept it.

These facts are all admitted by the demurrer to the petition, and are assumed to be true. Counsel for appellant and appellee concede the rule of law to be that parol contracts of insurance are obligatory. This we understand to be the general doctrine. It is insisted that the contract was not completed, inasmuch as the premium was not paid or credit therefor given. The renewal was to be issued in consideration of twenty dollars. So the question is whether the premium should have been tendered on the day the renewal policy should have been issued, in order to make the contract binding. No time was fixed for the payment of the premium, and, in the absence of such a contract, the premium would have to be paid on the day the renewal policy should have been issued under the contract, unless ³⁵⁹ the appellant was excused from paying it then by reason of a course of dealing with the agent of the appellee.

The appellee's agent had for years been issuing policies of insurance to the appellant, and during all these years the premiums were not paid on the day the policies were issued or renewals were made. The agent made charges upon his books against the appellant of the premiums, and when it suited his pleasure he presented the account, which was paid. The appellant had the right to rely upon this method of doing business, and presume, in the absence of a notice to the contrary,

that it would be followed by the company with reference to the contract under consideration. We think this method of transacting the business was, in effect giving a credit to the appellant for the premiums, and he had the right to understand that he was getting credit therefor, and that he was to pay it upon demand only.

In 1 May on Insurance, section 70b, it is said: "A naked oral promise of an insurance company's agent to renew a policy when it runs out is not actionable on the agent's failure to do so. It must be alleged that the premium was paid or tendered at the time the old policy expired. If this is done, however, damages may be recovered for failure to renew in accordance with an oral promise."

The author also says in the same section: "A conversation with the agent requesting him to renew, and a promise on his part to renew, the policy, do not constitute a renewal where no renewal receipt is given, no renewal indorsed on the policy or entered by the agent, or notified to the company, and no premium paid, tendered, or credit arranged."

The doctrine laid down by May is not in conflict with the conclusion we have reached. He lays down the rule that ³⁶⁰ it is essential to allege that the premium was paid or tendered at the time the old policy expired. He does not intimate that the necessity of the payment or tender could not be waived by express terms, or by a course of dealing between the parties. He does recognize, however, that, if credit be arranged, it is not essential that a renewal receipt should be given, or a renewal indorsed upon the policy, or premium paid or tendered in order to make a binding contract. Besides, the same author, in section 22a, says: "A parol contract of insurance is good, though nothing is said about the premium, where the parties have dealt together for several years, and know the rate of premium, and the agents have been in the habit of giving the plaintiff credit for the premium."

It is contended by counsel for appellee that the authorities distinguish between verbal agreements for insurance in futuro and verbal contracts of insurance in praesenti, and have rejected the former, but sustained the latter, character of contracts. We concede there is a conflict of authority upon this question. If we are correct in the conclusion that it was a completed contract, of course everything was done which was essential to be done to make it obligatory. We see no reason why an insurance company cannot, in anticipation of the ex-

piration of a policy of insurance, agree that it will issue a new policy at that time in consideration of a given sum of money. If the premium for the renewal was paid at the time the contract was made, it seems to us that no one could contend that it was not a valid contract. This being true, then there can be no question as to the right of the appellant to make a contract postponing the payment of the premium. This could be done by express contract, or it ³⁶¹ can be done, as was done in this case, by a course of dealing which shows that the parties contemplated that credit should be given for the premium, and that it should not be paid when a renewal policy was to be issued, but upon the demand of the agent.

The conclusion we have reached is supported by the cases of *King v. Cox*, 63 Ark. 204, 37 S. W. 877, and *Home Ins. Co. v. Adler*, 71 Ala. 516. In those cases it appeared that the contract was made within a few days of the expiration of the policies which were to be renewed. Counsel for appellee argues that the contracts in those cases were made so near the date of the expiration of the old policies the court regarded them as contracts of insurance in praesenti. The court in those cases did not hold that the contracts were enforceable, because the contracts for renewal were made but a short time before the expiration of the old policies, and therefore were contracts in praesenti. They simply adjudged that parol contracts for the renewal of policies, which were made before the expiration of the old policies were binding. If a contract made for the renewal of a policy two or three weeks before the expiration of the old policy is binding, we can see no reason why the contract made five months before is not equally binding. If it is a completed contract, as we believe the one under consideration was, it is enforceable.

The judgment is reversed for proceedings consistent with this opinion.

A *Contract of Insurance* may rest in parol: *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 52 Am. St. Rep. 534, 43 N. E. 512. And it may exist without the payment of the premium: *Western Assur. Co. v. Albin*, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119; if credit is given the assured: *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854. Compare *Tomseck v. Travelers' Ins. Co.*, 113 Wis. 114, 90 Am. St. Rep. 846, 88 N. W. 1013.

WESTERN UNION TELEGRAPH COMPANY v. VAN CLEAVE.

[107 Ky. 464, 54 S. W. 827.]

TELEGRAPH COMPANIES.—Mental Anguish.—caused by the negligent delay of a telegraph company in delivering a message announcing the time of the funeral of a brother of the sendee of the message, may be recovered for as an independent element of damage. (p. 367.)

TELEGRAPH COMPANIES—Night Messages.—The receiver of a night message cannot recover from the telegraph company for delay in its delivery, if it was delivered within a reasonable time on the morning following its receipt, strictly in accordance with the terms and conditions assented to by the sender. (p. 368.)

TELEGRAPH COMPANIES—Night Messages.—Telegraph companies may establish reasonable hours within which their business may be transacted, and they may fix such hours with reference to the quantity of business done. They are not required to employ both a day and night messenger, if it is apparent that the business of the office will not justify such employment. (pp. 368, 369.)

W. Lindsay, A. E. Richards, Richards, Weissinger & Baskin, and W. J. Lisle, for the appellant.

Russell & Sons and F. Shuck, for the appellee.

465 HAZELRIGG, C. J. The appellee recovered judgment of appellant for the sum of one thousand dollars for mental anguish caused by his inability to attend his brother's funeral, and which nonattendance, he avers, was owing to the negligent failure of the appellant to deliver to him in a reasonable time a telegram announcing the death of that relative. The message was sent from the appellant's office at Lake City, Missouri, at about 9 o'clock on the evening of January 1, 1894, and reached Lebanon, Kentucky, the place of its destination, at 11:44 o'clock on the same evening. **466** It was not delivered to the appellee until next morning at about 8 o'clock, and too late for the first train out that morning. It may be assumed, for the purposes of the case, that the failure of appellant to get the train was the sole cause of his not attending the funeral.

The appellant resists recovery on the grounds: 1. That mental anguish, accompanied by no physical injury, gives no cause of action: 2. That the message was a "night" message, and, according to the terms indorsed on the blank on which it was

written, was to be delivered "not earlier than the morning of the next ensuing business day"; and 3. That its office at Lebanon during the night was in charge of an operator, who was also the agent and night operator for the railroad company, and the rules of his employment forbid his leaving the office at night for any purpose; that a delivery boy was kept only from 6 o'clock A. M. until 6 o'clock P. M., because the business did not justify night delivery.

Other minor defenses were presented, but, as we shall see, they need not be considered.

The ground first suggested has furnished the occasion for much controversy, and much conflict of authority. It is probably in accordance with the views of a majority of the state courts that mental anguish and injured feelings alone, and unaccompanied with physical injury, do not furnish ground for recovery. But in this state the rule has been announced otherwise: *Chapman v. Western Union Tel. Co.* (1890), 90 Ky. 265, 13 S. W. 880.

And so likewise a recovery in this class of cases can be had under the decisions of the states of Texas, Alabama, Indiana, Iowa, North Carolina, and Tennessee. It may be admitted that there are difficulties in the way of an exact measurement of such damages, but it does not ⁴⁶⁷ seem to us that this is a sufficient reason why a negligent public carrier should escape with merely nominal damages. The same difficulty of accurately measuring such damages arises in cases of slander, breach of marriage contract, and in cases where mental suffering is accompanied with physical pain.

If, as argued, the law does not deal generally with the feelings and emotions, it may be answered that here the parties themselves have contracted with respect to those very things, or, at least, have contracted with respect to those things which naturally affect the feelings and emotions.

For the purpose of having him attend, a message is sent to a son, informing him of his mother's death, and the date of her funeral and burial. It must be supposed that a failure to deliver such a message will cause mental suffering; and this suffering is, therefore, a consequence or result within the contemplation of the parties. This is true whether the carrier is sued on its contract or because of its failure to perform a public duty as a common carrier of intelligence.

It is an old doctrine that, "when the parties have made a contract which one of them has broken, the damages which the

other party ought to receive in respect of such breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it”: *Hadley v. Braxendale*, 9 Ex. 341.

The rule is certainly not less comprehensive if applied as a test for the ascertainment of the liability of a common ⁴⁶⁸ carrier who may violate its public duty. The subject matter of the undertaking by the carrier is not of a pecuniary nature, and the breach of the undertaking cannot be measured by an attempted ascertainment of what money is lost by reason of the breach. As the question, however, must be regarded as a settled one in this state, we need not elaborate this branch of the case further. The doctrine is fully supported in the recent well-considered cases of *Mentzer v. Western Union Tel. Co.* (1895), 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1, and *Cashion v. Telegraph Co.* (1898), 123 N. C. 270, 31 S. E. 493, where all the cases are collated.

We are of the opinion, however, that the second and third points suggested are conclusive against appellee's right of recovery. While the nature of his action is in tort, and not on a contract—as he had none with the company—he cannot recover if the company has complied with the terms of its contract and undertaking with the sender of the message, provided, indeed, those terms are such as may reasonably be imposed and agreed upon. That night messages are a business necessity, and contracts of the kind made here for delivery of such messages on the next morning after sending them may be made, cannot be doubted in the face of the authorities and on principle: *Hilbard v. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211, 15 Atl. 29, and cases cited.

The contract enables the sender to get cheaper rates, and yet have his message delivered in time to be acted upon the next morning; and it enables the company to send the message during the odd hours of the night, when business is not pressing, and when it may furnish the ⁴⁶⁹ service at a cheaper rate. The court below, therefore, erred in striking this plea from the company's answer.

We think it likewise competent for such companies to establish reasonable hours within which their business may be trans-

acted, and they may fix those hours with reference to the quantity of business done. They may not be required to employ both a day and a night messenger, if it be apparent that the business of the office will not justify such employment. This we understand to be the rule everywhere: *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Western Union Tel. Co. v. McCoy* (Tex. Civ. App.), 31 S. W. 210. Under the proof on the points last named, the law is for the defendant, and a peremptory instruction should have been given.

Wherefore the judgment is reversed for proceedings not inconsistent with this opinion.

Mr. Justice Du Belle Dissented on the ground that mental anguish is not an independent element of damage for which a recovery may be had.

In the case of *Western Union Tel. Co. v. Steenberger*, 107 Ky. 469, 54 S. W. 829, the court held that a father in law could not recover damages for mental anguish caused by the absence of his son in law at the death of his mother in law, when such absence resulted from the delay of a telegraph company in delivering a message. This ruling was placed upon the ground that the relationship of the parties was not near enough to justify a recovery. The court also held, on the authority of the principal case, that it was not the binding duty of a telegraph company to deliver a message received at night until a reasonable time after the beginning of office hours on the following day, when the latter method of delivery is that stipulated for between the telegraph company and the sender of the message.

In the case of *Morrow v. Western Union Tel. Co.*, 107 Ky. 517, 54 S. W. 853, the court held that no recovery could be had for mental anguish growing out of the failure of a telegraph company to deliver promptly a message to a husband, whereby his wife was prevented from attending the funeral of her grandmother, in the absence of a showing that the message was sent, with notice to the company, for the purpose of bringing the wife to such funeral.

In *Western Union Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, the court again decided that it is "well settled that telegraph companies may make reasonable rules and regulations for the conduct of their business, and may, where the volume of the business does not require it or justify the expense, close their office for night delivery." In *Western Union Tel. Co. v. McIlroy*, 107 Ky. 633, 55 S. W. 428, it appeared that the following message was sent: "To Dan McIlroy, Willisburg, Ky. George insane. Taken to La Junta to-night for safekeeping. Come. Walter Dews." Also that the George mentioned was a brother of the sendee in the message. Also

that there was a negligent delay of between three and four days in delivering the message. In deciding the case the court said: "This suit was brought by the appellee for mental anguish growing out of the negligent delay of the company in delivering the message. That there was negligence is palpable, and that the urgency of the message was apparent on its face is also evident. The appellee is, therefore, entitled to recover under the law as settled by this court in a number of similar cases recently considered. The amount of the recovery—one thousand dollars—is rather large, but, under all the circumstances, not so large as to call for interference. It is easily inferable from the proof that, had the appellee reached his brother a few days earlier, his life might have been saved, or at any rate, his sufferings greatly alleviated. The belief of this fact naturally greatly increased the appellee's anguish, and this anguish is directly traceable to the delay in getting the message."

Damages for Mental Suffering may be recovered of a telegraph company for negligently failing to deliver a message, whereby the addressee is prevented from attending the funeral of a near relative: *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, 62 N. W. 1. But see *Western Union Tel. Co. v. Ayers*, 131 Ala. 391, 90 Am. St. Rep. 92, 31 South. 78. And see generally, on the question of damages against telegraph companies for mental suffering, *Butter v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893, and cases cited in the cross-reference note thereto; monographic notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790; *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875.

A *Telegraph Company* may adopt reasonable regulations as to its business hours, and is not answerable for delay in the delivery of a message caused by its being received out of those hours: *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15. But see *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. 734.

DAVIS v. WESTERN UNION TELEGRAPH COMPANY.

[107 Ky. 527, 54 S. W. 849.]

TELEGRAPH COMPANIES—Void Stipulations.—A stipulation in a contract between a telegraph company and the sender of a message that the company will not be liable for damages in any case if the claim is not presented in writing within sixty days after the message is filed with the company for transmission is against public policy and void. (p. 371.)

TELEGRAPH COMPANIES—Notice of Nature of Message.—As to the sendee of a message, the telegraph company is charged with notice of the necessity for prompt delivery if the message announces a death and the time of the funeral. (p. 372.)

S. Hodge, for the appellant.

Richards, Weissinger & Baskin, W. Marble, G. H. Fearons, and W. Lindsay, for the appellee.

528 HAZELRIGG, C. J. In the answer to the suit of appellant for damages growing out of its alleged negligence in delivering a telegram, the appellee company, among other defenses, presenting issues of fact, relied on a stipulation printed on the back of the message, and signed by the sender, to the following effect: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

On demurrer, the lower court seems to have held this provision a bar to recovery by the plaintiff, the sendee of the message, and this petition was therefore dismissed.

That such a provision, as respects telegrams, is contrary to public policy, and will not be upheld seems to be indicated in *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, and the rule is authoritatively so announced by this court in *Telegraph Co. v. Eubank*, 100 Ky. 591, **529** 66 Am. St. Rep. 361, 38 S. W. 1068. It was error to hold that the stipulation presented a valid defense.

It is contended, however, that the demurrer to this paragraph of the answer reaches back to the petition, and that pleading states no cause of action, because the language of the message in dispute did not give the company notice of the relationship between the parties named in the message.

But this suit is by the sendee or addressee of the message, who is presumed to have a serious interest in its prompt delivery. The terms of the message also clearly so indicate: West-

ern Union Tel. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961; Western Union Tel. Co. v. Luck, 91 Tex. 1787, 66 Am. St. Rep. 869, 41 S. W. 469.

The message under consideration was as follows:

"To John Davis, Princeton, Ky.:

"Brother Mose died yesterday, 7:30 P. M. Funeral tomorrow afternoon.
(Signed) I. PHAR."

Whether true or not, the presumption is that Davis was a near relative of the dead man, and the object in sending him the message was that he might attend the obsequies of his relative.

In Western Union Tel. Co. v. Adams, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, it was said: "When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest."

The petition is sufficiently explicit, and states a good cause of action.

For the reasons given, the judgment is reversed for further proceedings consistent herewith.

A Printed Stipulation on the Back of a Telegraph message that the company shall not be liable for damages if the claim therefor is not presented in writing within sixty days after the message is filed for transmission is unreasonable and violative of the constitution: Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068; Francis v. Western Union Tel. Co., 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078; Western Union Tel. Co. v. Kemp, 44 Neb. 194, 48 Am. St. Rep. 723, 48 N. W. 723; Mathis v. Western Union Tel. Co., 94 Ga. 338, 47 Am. St. Rep. 167, 21 S. E. 564, 1039. Compare Harris v. Western Union Tel. Co., 121 Ala. 519, 77 Am. St. Rep. 70, 25 South. 910; Western Union Tel. Co. v. Dougherty, 54 Ark. 221, 26 Am. St. Rep. 33, 15 S. W. 468; Hill v. Western Union Tel. Co., 85 Ga. 425, 21 Am. St. Rep. 166, 11 S. E. 874.

A Telegraph Message may, by its terms, put the company on notice of the damages or injuries likely to result from a failure promptly to deliver it: See Western Union Tel. Co. v. Hines, 96 Ga. 688, 51 Am. St. Rep. 159, 23 S. E. 845; monographic note to Western Union Tel. Co. v. Cooper, 10 Am. St. Rep. 786-788; as where it reads: "Bravo is sick; come and fetch Miller at once," it being known that Bravo was a valuable horse and Miller a veterinary surgeon: Hendershot v. Western Union Tel. Co., 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 828.

STOVALL v. McCUTCHEN.

[107 Ky. 577, 54 S. W. 969.]

CONTRACTS in Restraint of Trade.—An agreement entered into by merchants to close their places of business at a certain hour each day for a limited period of time is valid and based upon a sufficient consideration, both from a financial and social or healthful standpoint. (p. 374.)

CONTRACTS in Restraint of Trade.—An agreement between merchants to close their places of business at a certain hour each day for a limited period is not illegal as in restraint of trade. (p. 375.)

INJUNCTION is Proper Remedy to prevent the breach of a contract between merchants to close their places of business at a certain hour each day for a limited period of time. (p. 375.)

INJUNCTION is a Proper Remedy to prevent a multiplicity of actions, or to prevent a repeated and recurring cause of action. (p. 375.)

S. R. Crewdson, J. S. Rhea and J. S. Hooker, for the appellant.

H. S. McCutchen and Craddock & Sandidge, for the appellee.

578 WHITE, J. In May, 1895, appellant and appellees, all merchants of Russellville, signed an agreement as follows: "We, the undersigned, merchants of Russellville, do hereby agree and obligate ourselves to close our place of business at 6:30 o'clock, beginning May 15, 1895, and lasting until the first of September."

579 The pleadings and proof all agree that the intention of this writing was that the stores were to be closed at 6:30 P. M. of each day during the time specified, except on Saturdays. After compliance for a few evenings after the 15th of May, appellant notified appellees that he declined to further comply with the agreement, but would disregard it. This he did.

Appellees instituted this action to obtain an injunction against appellant to prevent a violation of the agreement, or, rather, to compel him to specifically perform the agreement. A temporary injunction was granted.

Appellant made defense to the action, pleading that he signed the agreement conditionally. He alleges that one of the conditions was that others, who never did sign, were also to sign the agreement. Another condition was that he, at the end of a few days' trial, could withdraw from the agreement if he so desired—and that these conditions were left out by mistake,

as were the provisions that the closing was to be daily at 6:30 P. M., and not to apply to Saturdays.

On these issues, presented by the answer, proof was taken, and on final hearing the temporary injunction was made perpetual, and from that judgment this appeal is prosecuted.

It is insisted by counsel for appellant that there is no consideration for the agreement; that it is against public policy and void; that, because of its uncertainty, it cannot be specifically enforced; and that the trial court erred in adjudging, on the proof, that there were no conditions omitted from the writing.

We are of opinion that the proof fails to establish that appellant signed the writing with the understanding that ⁵⁸⁰ any others were to sign than those whose names appear thereto. We are also of opinion that the proof fails to establish appellant's contention that he had the privilege of withdrawal after trial.

We think there is sufficient consideration to uphold the contract. "Valuable considerations," says Bouvier (title "Consideration"), "are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request, or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made": Citing *Overstreet v. Philips*, 1 Litt. 123; *Lemaster v. Burckhart*, 2 Bibb, 30; *Wooldridge v. Cates*, 2 J. J. Marsh. 222.

Again the same author (Bouvier) says: "Mutual promises made at the same time are concurrent considerations, and will support each other, if both be legal and binding."

This court, in the case of *Talbott v. Stemmons*, 89 Ky. 222, 25 Am. St. Rep. 531, 12 S. W. 297, held a promise to abstain from the use of tobacco to be a sufficient consideration for an agreement to pay five hundred dollars. The court of appeals in New York, in *Hamer v. Sidway*, 124 N. Y. 538, 21 Am. St. Rep. 693, 27 N. E. 256, held the same thing.

We are of the opinion that the mutual promises to refrain from engaging in business after 6:30 P. M. of each day are sufficient loss or detriment in the way of financial transaction, or are sufficient gain or advantages from a social or healthful standpoint, to support a contract. The loss or gain is to be supposed to be alike to all parties. There is complete mutuality. Whilst it is true that contracts in restraint of trade are to be carefully scrutinized, and looked upon with disfavor, all

contracts in restraint ⁵⁸¹ of trade are not illegal. The restraint here put is but partial—very inconsiderable. It is but a few hours, at most, each day, and for three and one-half months, during the extremely hot weather.

It has come within the observation of the members of this court that during this season (May 15th to September) many merchants close about 6:30 or 7 P. M. This cannot be held to be an illegal restraint of trade.

As to the question of uncertainty of the contract, appellant's position might be tenable, if it were not shown by the pleadings in the case precisely what the contract was intended to mean. The courts rarely ever reform and then specifically enforce a contract. The reason of this is that the dispute comes as to what contract was intended to be entered into. This is not so here. All parties agree that this writing was intended to say and mean that the places of business should be closed at 6:30 P. M. each day, except Saturdays, between May 15th and September 1st.

We think that in this case injunction is a proper remedy. The recurring breach each day of the contract would require numerous actions at law, and by different plaintiffs as well; or, if not, there would at least be a continuing damage by the breaches and violation of the contract up to September 1st.

It has repeatedly, if not universally, been held that injunction is proper in either of these classes of cases, to prevent a multiplicity of actions, or to prevent a repeated and recurring cause of action: *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410.

Judgment affirmed.

An Injunction will lie to prevent a multiplicity of actions: *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 66; *South Covington etc. Ry. Co. v. Berry*, 93 Ky. 43, 40 Am. St. Rep. 161, 18 S. W. 1023. Injunctions to prevent the breach of a contract are considered in the monographic note to *Philadelphia Ball Club v. Lajoie*, 90 Am. St. Rep. 634 652.

Contracts in Restraint of Trade are valid if founded upon a good consideration, and if they afford only a reasonable protection: *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 86 Am. St. Rep. 346, 61 N. E. 1038; *Pohlman v. Dawson*, 63 Kan. 471, 88 Am. St. Rep. 249, 65 Pac. 689.

Consideration.—A benefit to the promisor or a detriment to the promisee constitutes a consideration for a promise: *Joseph v. Smith*, 39 Neb. 259, 42 Am. St. Rep. 571, 57 N. W. 1012; *Mosely v. Montefanto*, 61 Conn. 50, 29 Am. St. Rep. 170, 23 Atl. 714; *New York over Bank v. Bridgers*, 98 N. C. 67, 2 Am. St. Rep. 317, 3 S. E. 826;

Hamer v. Sidway, 124 N. Y. 538, 21 Am. St. Rep. 693, 27 N. E. 256. Mutual and concurrent promises are sufficient consideration for each other: Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 90; Babcock v. Wilson, 17 Me. 372, 35 Am. Dec. 263; Davis v. Galloway, 30 Ind. 112, 95 Am. Dec. 670.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. BLACKMAN.

[108 La. 121, 32 South. 334.]

CRIMINAL TRIALS.—A District Attorney Should not Throw the Weight of His Personal Influence into a case which he is conducting by announcing his individual opinion that the accused deserved hanging. (p. 379.)

CRIMINAL TRIALS.—Improper Remark from the District Attorney.—On a trial for murder, where the jury has a discretion to find in their verdict the punishment to be inflicted, it is improper for the district attorney to say to the jury, “if there is a man on that jury that does not believe this man ought to be hung, then I say he is a weakling not possessed of the proper manhood, and is unfit to sit on the jury,” and if an objection is made and an exception reserved to this line of argument, and it is not retracted, a judgment of conviction awarding the death penalty should be reversed. (p. 379.)

Walter Guion, attorney general, and Hugh Tullis, district attorney (Lewis Guion, of counsel), for the appellee.

John Dale, for the appellant.

121 BLANCHARD, J. Defendant was indicted for murder, tried by jury, found guilty and sentenced to death. He appeals.

In the course of his closing argument for the state, the district attorney said, in substance, that “if there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on the jury.” Counsel for the accused immediately objected to this language as **122** improper and prejudicial to his client, and reserved a bill of exceptions against the same.

Subsequently, he applied for a new trial on the ground that the language excepted to was not such as the district attorney could legally use, and that it was calculated to prejudice, and did prejudice, the jury against the accused. On the trial of this motion, the district attorney, called as a witness, admitted he had used, substantially, the language quoted, but that it was said in connection with an admonition to the jury that each of them had sworn he was not opposed to capital punishment.

The motion being overruled, the bill of exceptions referred to was presented and signed. It is considered a bill taken to the language objected to, and to the court's refusal to grant the new trial applied for on that ground. After quoting the language and stating the accused's objection to it, the bill recites that the district attorney did not retract what he had said, nor tell the jury not to regard the same. Neither was the trial judge asked to instruct the jury not to regard the same, and he did not give such instruction. It is also stated that the remark of the district attorney was not provoked by anything said in argument by counsel for the accused. The bill contains nothing in the way of a statement by the judge himself.

Ruling.—In prosecutions for capital crimes, juries in this state are given by the law discretion as to the punishment to be inflicted on the accused found guilty. Thus, a verdict "guilty as charged" would mean the infliction of the death penalty; while a verdict "guilty without capital punishment" would mean life imprisonment at hard labor. It is the only case—prosecutions for capital offenses—where juries are permitted to have anything to do or say with regard to the sentence to be pronounced upon persons convicted of crime.

In a murder trial, the jury may be convinced of the guilt of the accused, and yet there may be some mitigating circumstance, or other consideration, superinducing to the infliction of a penalty less than death. The law vests this power of mitigation in the jury, and not the judge. They must be left free to its full and untrammelled exercise, under proper instructions by the court. ¹²³ It is not for the district attorney, prosecuting on behalf of the state, to harangue the jury as to the punishment that should be meted out to the guilty culprit, and tell them, in substance, that if they do not bring in a verdict that will hang the man, instead of sending him to the penitentiary, they are weaklings, devoid of manhood and lacking in the qualities necessary to fit them for the proper discharge of the duties of citizenship relating to the jury service.

The district attorney, in this case, did not content himself with demanding of the jury that they find the accused guilty; he did not confine himself to expressing his opinion, based on the proof administered, of his guilt. He went further. He demanded, under penalty of his scorn and contempt if they did otherwise, that a verdict be brought in that would hang the man. It was a trenching on the province of the jury not permissible. The language used was intemperate and improper. It was calculated to unduly influence the jury in deciding on the punishment to be inflicted on the guilty man—something with which the prosecuting officer has nothing to do. If they do not believe he should hang, the district attorney expresses his opinion of them in advance that they are weaklings. If they should reach, in their consultations in the juryroom, the conclusion he should not be consigned to the gallows, they are, in anticipation, denounced by him who represents the state as without courage or manhood and unfit to discharge one of the most ordinary of the duties of citizenship. It was an appeal to the jury not merely to reach the conclusion of guilt, which was proper, but an admonition to them that they would be recreant in their duty if they returned a qualified verdict, which under the law they had the right to do, and as to which they should have been left the sole judges, unbiased by the forcible assertion of the prosecutor's opinion.

A district attorney should not throw the weight of his personal influence into a case which he is conducting as a public officer by announcing his individual opinion that the accused deserved hanging: *State v. Mack*, 45 La. Ann. 1157, 14 South. 141.

In *State v. Jones*, 51 La. Ann. 103, 24 South. 594, it was stated that where a prosecuting officer abuses the privilege of argument to the manifest prejudice of the accused, it is the duty of the trial judge to interfere, and if he ¹²⁴ fails to do so, and the impropriety is gross, it is good ground for reversal. We must hold the instant case comes within the rule thus announced. Though the district attorney's statement was objected to by counsel for the accused, it does not appear that the trial judge interfered, and though the matter was by the exception reserved called specially to his attention, he did not in his charge to the jury refer to it in any way.

In *State v. Thompson*, 106 La. 366, 30 South. 897, this court said: "There is ample authority in support of the doctrine that

it is reversible error for the trial judge to fail, of his own motion, to give such instructions as will efface from the minds of the jurors the impression made by statements of counsel which are unauthorized and prejudicial, and there are many cases in which it has been held the wrong done is not remedied even by such instructions."

And the court, in that case, quoted as follows from *Nelson v. Welch*, 115 Ind. 270, 16 N. E. 634, 17 N. E. 569: "Where the party who is injured by the wrong calls for the intervention of the court, upon objections, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury."

The Thompson case, which was a trial for murder, is the latest expression of this court on the question we are dealing with. There the prosecuting officer, in his closing argument, referring to the widow of the deceased who had been examined as a witness for the state, said: "I will say nothing to you of her six fatherless little children." Counsel for the accused objected, and excepted on the ground that no evidence had been offered relative to such children. No action was taken by the trial judge and he did not, either at the moment or subsequently in his charge, instruct the jury to disregard the unauthorized reference complained of. The verdict and sentence were set aside, notwithstanding no demand was made on the judge by counsel for the accused for instructions to the jury in the matter.

Had the judge, in the case at bar, on objection made, interfered, and either then, or later in his charge, instructed the jury that the district attorney had no right to use the language complained of, and for them to give no heed to it, and otherwise instructed them as to ¹²⁵ their rights and duties with regard to the character of verdict the law authorized them to return, we would hold that this saved the error of the prosecuting officer from vitiating the verdict. But in the absence of such action by the judge we are constrained to remand the case.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence appealed from be set aside and that the case be remanded for further proceedings according to law.

Misconduct of Counsel in Argument, when so seriously improper as to call for a reversal of judgment, is considered in the monographic note to *McDonald v. People*, 9 Am. St. Rep. 559-570; *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344, and cases cited in the cross-reference note thereto; *Haupt v. State*, 108 Ga. 53, 75 Am. St. Rep. 19, 34 S. E. 313; *Rhodes v. Commonwealth*, 107 Ky. 354, ante, p. 360, 54 S. W. 170. The prosecuting attorney in a crim-

inal trial represents the majesty of the people; and, having no responsibility except fairly to discharge his duty, should put himself under proper restraint, and should not go beyond the evidence or the bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice, seeks to procure a conviction at all hazards, he ceases properly to represent the public interest: *People v. Fielding*, 158 N. Y. 542, 70 Am. St. Rep. 495, 53 N. E. 497.

PALMISANO v. NEW ORLEANS CITY R. R. CO.

[108 La. 243, 32 South. 364.]

CHILDREN—Right to Lecture and Frighten for Misconduct.

Where boys in the streets of a city have been stealing rides by hanging on the rear end of a gravel train, an employé in charge thereof is, after vainly trying to make them desist by warning and threats, justified in catching hold of and lecturing one of them and frightening him by threats of arrest if he did not desist. (p. 382.)

CHILDREN—Injury Caused by Frightening—Liability for, Where does not Exist.—If an employé, for the purpose of causing boys to desist from hanging on the rear of a gravel train and stealing rides, catches one of them, threatens him with arrest, and tells him to go and tell his playmates that the first one caught on the car will be locked up, and the boy, on being released, runs away in a direction opposite that in which it was suggested he should go, and runs into and is injured by another train, his failure to see it probably being caused by his fright, no recovery for his injuries can be had against the employer. (p. 384.)

Boatner, Dodds & Boatner, for the appellee.

Denegre, Blair & Denegre, for the appellant.

244 PROVOSTY, J. Salvator Palmisano, a boy seven years and nine months old, and two other boys, were stealing a ride by hanging on to the rear end of a gravel-car drawn by an electric street-car on defendant's road in the city of New Orleans. The motorman of the traction car, who had been considerably annoyed by the like conduct of these and other boys, as his train went back and forth that day, conceived the plan of capturing one of the boys to lecture him, and in execution of that plan turned off the power from his car, put on the brake and beckoned to the conductor to come and take his place, and, when the car was about to come to a stop, slipped off and crouched, and as the rear end of the gravel-car reached him, caught hold of the Palmisano boy. He stood with him between the rails of the track up which the gravel-car had

just passed and lectured him, holding him with one hand and shaking a finger of the other hand at him the while, and then turned him loose. What he told the boy was this: "Look here, young fellow, you have been jumping on this car every time you get a chance, and I have a good mind to have you arrested. Go and tell all your playmates the first one I catch on this car I am going to lock him up."

Alongside this track was another track, the two tracks being four feet three inches apart; on this other track an electric street-car was coming. The boy, as soon as set free, scampered off, running toward his home, in the direction opposite to that in which the gravel-car had gone and the same as that in which the car on the other track was coming. His course tended to converge with that of the coming car. The bystanders and the motorman of the coming car seeing the danger ²⁴⁵ of a collision hallooed at him, but too late; he came in contact with the side of the car just aft of the front platform, was thrown down, and his left foot crushed, necessitating amputation just above the ankle.

How far the spot when the motorman stood when he held the boy was from the spot of the collision, and precisely in what direction the boy started to run when he was released, and, at that exact moment, how far off was the down-coming car—these are the points on which the testimony conflicts. This testimony cannot be reconciled, and the analyzing of it would serve no useful purpose. The efforts of plaintiff have tended to abbreviate the distances so as to bring the act of the motorman and the accident in closer relation, and those of the defendant have tended to the contrary, so as to give greater scope to the agency of the boy; and with the same ends in view the plaintiff would have the course of the boy as direct across the course of the car as possible, and defendant the contrary. The boy ran far enough to give time to the bystanders and to the motorman of the descending car to halloo at him, and to hope that there was yet time for him to change his course; this shows that mere distance and time are not controlling elements, or even necessarily important elements in the problem.

The view we take of the case is that the descending car was blameless, as plaintiff admits; and that the motorman of the traction car did nothing but his duty, and did not do it in an improper manner. The theory of the plaintiff is that the child was so frightened by the acts of the motorman that for the

time being he had lost his wits, and that in a dazed and bewildered condition he instinctively made for home, his course thereto lying across the path of the car, and that the motorman, by detaining the child until the down-coming car was close and the danger from it imminent, and then suddenly turning him loose, in the face of the car, as it were, was guilty of negligence.

If it be true that the child was so frightened as to lose his wits, is the motorman responsible, when he did no more to him than what was the proper thing to do? Had he exercised undue severity, either in act or language, then might some fault attach to him, but he simply caught and held the child—admittedly the proper thing to do—and lectured him with moderation—again the proper thing to do. We do not see how fault could attach to him on that score.

²⁴⁶ To say that he should have held the child longer than was necessary for the purpose of the lecture, or that he should have carried him away from a place so near to a track on which an electric-car was either going to pass, or in the act of passing, is to look at the situation from the standpoint of what has happened, and not from the standpoint of what, under the circumstances, was likely to happen; or of what the motorman, under the circumstances, had reasonable grounds for supposing might happen. Here was a street urchin who that very day had been getting on and off this gravel-car every time it sped by; was the motorman to suppose for a single instant that this boy, who had been accomplishing these car-riding feats all day, would be likely to run into a passing car if turned loose near a car track? So far as the impressionability or timidity of the boy is concerned the motorman had the perfect right to deal with him as with any other street gamin caught in the same way; and the average street gamin is not usually bereft of his wits by being held without violence and being told that future punishment shall be visited on him in case he renew his offense. By continuing to catch on to this car and holding onto it all that day, despite remonstrances and threats of the motorman and of the conductor, this boy had made full proof of his possessing the usual assurance and brazenness of the street gamin.

That the boy forgot himself is clear, and that the act of the motorman contributed to cause the forgetfulness is also clear; but those acts were links in the chain of events, and were themselves brought on as the legitimate or natural consequences of the fault of the boy in catching onto the car, and

of the fault of the parents of the boy in letting him indulge in that dangerous amusement. By the way, the house of the parents was close by, facing on the same street, so that they had a full opportunity that day of witnessing the boy's dangerous pastime.

We cannot hold defendant responsible.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be set aside and that the plaintiff's suit be dismissed, with costs in both courts.

Breaux, J., concurs in the decree.

It is not Within the Scope of an Employé's authority, to whose custody his master's property has been confided, to undertake to secure it from future injury by chastising persons who have done damage to it in the past. Thus, if a servant punishes a boy for breaking his master's ax, the master is not liable for the assault: Brown v. Boston Ice Co., 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644. And a master is not answerable where his servant, in frightening away trespassing boys, injures a boy who is not engaged in the mischief: Guille v. Campbell, 200 Pa. St. 119, 86 Am. St. Rep. 705, 49 Atl. 938.

LINDSEY v. TIOGA LUMBER COMPANY.

[108 La. 468, 32 South. 464.]

JURY TRIAL.—When a Juror Becomes so Ill During the Trial of a Civil Case that he is unable to attend, the court may cause additional jurors to be summoned, and require one of them to be selected to take the place of the juror disabled, and then order the trial to proceed de novo. (p. 386.)

MASTER AND SERVANT—Minor Employé Injured Through Failure to Instruct. A minor employé, who is set to work where the work of his coemployés made it necessary for his protection that he should have been informed that an error on their part would carry with it danger to him, and have been told of this possible danger and the means of guarding against it, and if, by reason of not being so told, he is injured, his employer is liable. (p. 389.)

MASTER AND SERVANT—Failure of Fellow-servant to Instruct Inexperienced Employé.—A master cannot escape liability for an injury suffered by a minor, inexperienced employé, from the failure to warn him of the dangers of his employment, and to instruct him how to avoid them, on the ground that such failure was due to the fault or neglect of a fellow-servant. (p. 389.)

MASTER AND SERVANT—Punitive Damages.—In an action by the parents of a minor, whose injuries and death were due to his inexperience in the employment to which he was put, and the failure to warn him of the attendant danger, the jury, in estimating the

damages, should not act arbitrarily, nor award vindictive or punitive damages. In this case a verdict of five thousand dollars was reduced by the appellate court to two thousand five hundred dollars. (p. 391.)

Wallace & Moss and Ryan & Blackman, for the appellees.

White & Thornton, for the appellant.

470 NICHOLLS, C. J. Before reaching the merits we have to dispose of a question raised by a bill of exceptions which we find in the record taken **471** by defendant. The bill recites that on the trial of the cause after a jury of twelve had been impaneled, the pleadings read, testimony partially adduced and the trial proceeded with for one day, that on the morning of the second day one of the jurors, who had been sworn in the case, was reported sick, and unable to attend court, whereupon the presiding judge ordered that additional jurors be summoned as in case of talesmen to supply the place of the said Charles Turner, to which ruling counsel for defendant objected on the ground (see *Moffet v. Koch*, 106 La. 371, 31 South. 40), that it was incompetent after a jury had been impaneled, a part of the testimony adduced and the trial proceeded with, to discharge a juror and select another to proceed in his place, which objection was overruled for the following reasons:

“By the Court. Charles Turner, one of the jurors, was too ill to attend court, being confined to his room with fever, and so notified the court. The court ordered an additional juror to serve in the place of the said Turner. One juror was offered and both parties accepted him and the other jurors were sworn over. I ordered the case to be proceeded with de novo by reading the pleadings and introducing the evidence. The authority to do this on the application of either plaintiff, I think, is fully recognized by the authorities, particularly the decisions of our supreme court, in *Follin v. Foucher*, 8 La. 563-565, and *State v. Monela*, 39 La. Ann. 868, 2 South. 811, and authorities there referred to. Unless this power can be exercised by a judge a civil jury case could be protracted almost indefinitely at great costs, delay and inconvenience to litigants and witnesses. There can be no resulting injury to defendant, and in this case both plaintiff and defendant accepted the additional juror.”

Counsel of defendant, before us, questions simply the right and power of the court, under the circumstances shown, to have substituted a new juror for the sick one without his con-

sent. If the substitution itself, he says, was legal he has no complaint to urge against the regularity of the subsequent proceedings. He argues that the trial could not have legally proceeded in the absence of the juror, that therefore the situation forcedly required either that the jury should be entirely discharged and matters taken such shape thereafter as would follow legally as the result of a mistrial, or that the case should either be postponed or continued to await the result of the juror's illness. He says he does not claim the right to select any particular juror, but the jury being complete, ⁴⁷² accepted and sworn and the case entered into, he had the right to insist upon retaining him.

We have, on a number of occasions, stated that the right of litigants in respect to jurors is not a right of selection, but of rejection. The claim urged here is one of "retention." That the court had the power and right to have made the substitution, if done with counsel's consent, is not denied; it is not, therefore, the "authority" of the court which is impugned, but the circumstances under which this authority was exercised. Defendant did not seek to have the juror retained through a demand to have the trial either temporarily postponed or continued. Had he made a demand to that effect, we assume it would have been acceded to. This was the only form under which "retention" of the juror could be made to take the shape of a "right," for this asserted right would have disappeared at once before the unquestionable authority of the court to have discharged the jury: *Henry v. State*, 4 *Humph.* 270. When counsel did not urge his right to a postponement or a continuance of the case, we think he lost his vantage ground, and left the action taken by the court free from any reasonable complaint: *Thompson & Merriam on Juries*, c. 13, sec. 273.

The person injured in this case was a youth seventeen years of age, differing in no particular respect from boys of that age. The evidence shows that he was utterly unfamiliar with the machinery of a sawmill. He had been employed at the mill only some seven or eight days, his employment being outside, in the yard, assisting in taking logs from the pond. On the morning upon which he was injured, the mill being short-handed, he was called from this work into the mill by the foreman of the establishment, and assigned to the work at which he was injured without any warning or instructions whatever. Counsel of defendant in their brief say: There was nothing

in his mental or physical condition that called for any particular instruction or warning, considering the nature of the work that the foreman called on him to perform, that work not being connected with the handling or directing the movement of any machinery. As to the danger of that position, that question is so closely connected with the manual duties to be performed, that they must be considered together. The place was what is known in sawmills as the "hole" or "box," and is shown to be a necessary place in all sawmills, and in area was about six to by three feet, ⁴⁷³ which area could be lengthened by pushing up a movable barrier. There was room enough in it for the needs of the workmen standing there, and it was properly located and constructed.

The work to be done there by Lindsey (the deceased) was to assist in removing plank that was passing down the live rollers and placing them on a platform from whence they could be sent to an instrument called the "edger," when necessary, though Lindsey's duty ended when the plank was placed upon the platform. In the performance of this work he was assisted by another workman, a man named Womack, who also managed what is called the "cut-off saw" at his end. The method by which Lindsey worked was to insert a hook into the end of the plank and pull it forward on to the platform mentioned. He did not have to lift the plank, but simply to pull it forward, while Womack did the same at his end. There was no possibility of this live roller being blocked up with lumber by not removing it, for if the lumber on it was not touched, it would pass on and fall into a space prepared for it underneath the mill, the roller working somewhat after the principle of a cane carrier in sugar-mills. And it seems that it was only the lighter lumber, like plank, that was to be removed when it was desired to saw or trim them, the heavy pieces being carried on and otherwise disposed of. It can be readily concluded that the task assigned to Lindsey did not require the exercise of any special strength and this is the opinion expressed by all the witnesses.

As to the degree of skill and experience required to perform the work, there is variance in the testimony, but the great preponderance of it is on the side that it did not require either skill or previous experience; that it was not a complicated case to work at and did not require any special skill, the duty consisting in picking up the end of a plank and moving it properly; also that Lindsey had been there long enough to know how to

catch the end of the plank and move it. Lindsey was not placed in charge of any machinery dangerous or otherwise. He had nothing to do with the saws and was not injured by them. His work consisted simply in pulling one end of plank from the live rollers as it reached him and placing it on a platform by his side, in order for it to be sawed by another man, and it was not the live rollers from which he was taking the plank that injured him. Either Lindsey was negligent about the attention to do his duties at ⁴⁷⁴ that particular time or that Womack failed to be as careful as he should have been. In the first event, the doctrine of contributory negligence, and in the second, the fellow-servant doctrine barred recovery. In either event the plaintiff could not recover. If there was danger, it was plain and open to view and easily avoided with ordinary care. Lindsey had been working long enough to be well acquainted with it. Lindsey himself sought the work upon which he was employed.

We are satisfied from the evidence that the place at which Lindsey was set to work, and that the work to which he was assigned were both dangerous and required some experience, and called for notice or warning of the dangers to which a person employed in that place and that work would be exposed. Several of defendant's own witnesses testified as to the danger both of the place and of the work and to the necessity of knowledge and experience, and one of the workmen engaged at the "edger" urged and warned the young lad not to do the work, without specifying, however, what the danger was, or giving any instructions. It is useless and irrelevant to discuss what the danger of this particular place or what the danger of this particular work was relatively to the danger of other places or other work about a sawmill; also whether the mill was short-handed that morning or Lindsey sought the work. We have to confine ourselves to this special place and work.

It is very true that Lindsey was not placed in charge of a saw and did not operate machinery himself, and also true that he was not injured directly by the live rollers from which he took the planks, but he was surrounded by machinery operated by other parties and he was injured by being thrown violently into the machinery, at the edger which was at his side or behind him by being struck by a plank thrown from the live rollers by not being judiciously or skillfully handled by Womack and himself, jointly, or by one or the other. Defendant argues that if the injury was occasioned by the negligence and

fault of Womack, the action would necessarily be barred by the fellow-servant doctrine, and if it was occasioned by Lindsey's own negligence his father and mother could not recover. If the work on which these parties were engaged was such as made it necessary for Lindsey's protection for him to be informed that the slightest error ⁴⁷⁵ on the part of his fellow-workman would carry with it great danger to himself, and that, therefore, he should specially watch all his movements and guide his own actions and conduct by them, defendant's company's foreman would certainly not be justified in permitting Lindsey to go to work under the impression and belief that it made no particular difference whether the two ends of the planks taken from the live rollers should be taken off simultaneously or not. If the effect of a failure on the part of either Womack or himself to seize the two ends of a plank simultaneously would be to throw one of the two ends of the plank crosswise, so as to be caught up by heavy timbers passing down the rollers and thrown violently back against the man opposite to it and pushing him into the edger machinery, he should certainly have been informed of this possible or probable danger so as to guard against it. If by reason of not having this information and not taking the precautions for safety which he would have taken had he known it, he receives injury, his employer is liable to him, not for the fellow-servant's fault, but for his own fault in not giving him proper information and warning. The fault of the fellow-servant would be simply the occasion giving rise to the master's liability, the cause of the liability would be his own direct individual fault. If the injury to Lindsey should have resulted from his own act of omission or commission, it would by no manner of means follow that his employer would be relieved from liability by reason of that fact. An act unskillfully or imprudently done is not necessarily a fault on the part of the person who does it. The unskillful or imprudent doing of the act may be imputable as a fault to some one else who was charged with the legal duty of preventing or guarding against the omission to do so, giving rise to a legal cause of action against him by the very party who committed the unskillful or imprudent act.

We are of the opinion that the deceased was not given the information and warning he was entitled to receive from the defendant company, his employer, and that the injury received by him was the result of that fact, and that the conclusions of the jury and the court on those points were correct.

We now turn our attention to the amount of damages which plaintiffs demand. This is a matter difficult to fix in a case where each and every factor which goes to make up the sum total is uncertain and ⁴⁷⁶ problematical. The deceased was a youth of seventeen years. When we come to estimate damages upon what would have been his length of life, we deal largely in conjecture, for there are many matters as to which no testimony can be adduced. For instance, we can form no idea as to the occupations which he might have engaged in, the climate of the places in which he might have been called on to reside, his special habits and character as they would be developed later. We do not know whether he would have returned to his parents, and, if so, how long he would have remained with them, nor can we form any idea as to the extent he would have recognized, in fact, his various duties toward them or been able financially to carry them out. The evidence shows that he had absented himself from his home and his parents knew nothing of his whereabouts. As matters stood at his death, he was practically no assistance to them. When we come to consider the grief and sorrow of a parent, if they be allowable at all as elements of damage, how are they to be tested and how are they possibly to be gauged? Plaintiffs do not sue upon a derivative action from their son, but upon a direct cause of action in themselves conferred by law. Our Civil Code, in article 1934, declares, in matters of contract, the general rule to be that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, but that there are cases in which damages may be assessed without calculating altogether on the pecuniary loss to the party, instancing "where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, in morality or taste, or some congenial or legal gratification." As to these, the article says "though these are not appreciated in money by the parties, yet damages are due for them by each; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule." It then adds: "In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses and contracts, much discretion must be left to the judge or jury, while in others they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor."

In *Downing v. Morgan's etc. Ry. etc. Co.*, 104 La. 523, 29 South. 207, we referred to this subject saying, that though much had to be left to the discretion of the judge ⁴⁷⁷ or jury, under this article, they should not act arbitrarily in the matter. We do not think this is a case entitling plaintiff to vindictive or punitive damages.

We think it due to the defendant to say that the charges made of attempted concealment of the death of the son and of disregard of what was called for in the premises by feelings of humanity are not only not sustained, but that the evidence establishes commendable conduct on their part. The parents of the youth were unknown to the defendant, and he did not seem disposed to give information on the subject. The defendant had him conveyed with proper assistance to the Charity Hospital at New Orleans to be attended to, and, upon his death, furnished a neat coffin, caused him to be buried in a proper cemetery and paid all the expenses.

The verdict returned is for too large an amount. The amount should be reduced. For the reasons assigned, it is ordered, adjudged and decreed that the judgment appealed from be, and the same is, amended by reducing the amount of the judgment to two thousand five hundred dollars, and as amended it is hereby affirmed. Costs of appeal to be borne by the appellee.

Provosty, J., dissents.

Rehearing refused.

When a Juror Becomes Sick, the court may discharge the jury: *State v. Smith*, 44 Kan. 75, 21 Am. St. Rep. 266, 24 Pac. 84.

Infant Employés are Entitled to Warning of danger, which, on account of their youth and inexperience, they do not fully comprehend. If such warning is not given, or is inadequate, the master is in fault and must answer for the consequences: *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Addicks v. Christoph*, 62 N. J. L. 786, 43 Atl. 196, 72 Am. St. Rep. 687, and cases cited in the cross-reference note thereto; *O'Connor v. Golden Gate etc. Mfg. Co.*, 135 Cal. 537, 67 Pac. 966, 87 Am. St. Rep. 127, and cases cited in the cross-reference note thereto. And he cannot relieve himself from responsibility by showing that he delegated the performance of his duty to another servant, who was at fault in performing it: *Newbury v. Getchel*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743.

STATE v. LAND.

[108 La. 512, 32 South. 433.]

EXECUTION—Exemptions in Favor of Laborers.—A statute exempting “laborers’ wages” does not apply to the wages of a locomotive engineer in charge of a passenger train. (p. 392.)

David Thompson Land, for the relator.

Respondent Land pro se (Leonard, Randolph & Rendall, of counsel).

512 BREAU, J. Exemption vel non from seizure for debt of the wages of a locomotive engineer under the provisions of Statute 79 of 1876, **513** amending and re-enacting article 644 of the Code of Practice, is the issue before us for decision.

A mechanical engineer running a passenger train is one who possesses skill and expertness. His position is highly responsible and requires judgment, attention and the conscientious discharge of duty. His character and reputation are fair subjects of inquiry when he presents himself for employment as well as the training and experience he has had.

The statute exempts “laborer’s wages,” a term of very broad meaning, it is true, but it remains that the skilled mechanic thoroughly versed in all the details and intricacies of his art is not to be compared with a laborer who hires himself out to serve on plantations or to work and toil in manufactories as a mere servant, subject, without question, to the will and direction of the master. The former is frequently consulted in matters of the utmost importance and his suggestions nearly always considered and heeded.

We are only concerned with the words “laborer’s wages,” and whether or not the wages of the master mechanic in charge of a passenger train are exempt.

We do not think they are; and in our view he is not a laborer within the meaning of the statute. To illustrate, we will mention that his coal heaver who throws over the coal from the bin to the furnace is exempt, but not the mechanic, whose knowledge, trained eye and hand are relied on to protect the hundreds of passengers whose safety depend on his skill and duty intelligently performed. He commands those about him whenever necessary in the performance of his work. He is an employé, and not a mere laborer. He is not a mere laborer any more than the highly trained electrical engineer or any other trained tradesman who receives salary or wages.

The following is an authority in point: "Artificers, handicraftsmen, or miners, etc., do not necessarily or properly fall under the denomination of laborers, there being, as I take it, a known distinction between a journeyman in any art, trade, or mystery or other workmen employed in the different branches of it and a laborer": *Lowther v. Radnor*, 8 East, 124.

Referring to Webster's definition, it is said that a laborer is one who works at a toilsome occupation, a man who does work requiring little ⁵¹⁴ skill, as distinguished from an artisan: 18 Am. & Eng. Ency. of Law, 2d ed., 71, and authorities cited in support of note 4; *Missouri R. R. Co. v. Baker*, 14 Kan. 563. A civil engineer is not a laborer or workman: *Pennsylvania etc. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189.

Worcester defines a laborer to be "one who labors"; one regularly employed at some hard labor; a workman; an operative; often said of one who gets a livelihood by coarse manual labor as distinguished from an artisan or professional man.

"Clerks, agents, cashiers of banks, and all that class of employes where employment is associated with mental labor and skill were not considered laborers." citing *Savannah etc. R. R. Co. v. Callahan*, 49 Ga. 511; *Oliver v. Boehm*, 63 Ga. 172; *Richardson v. Langston*, 68 Ga. 658; *Hinton v. Goode*, 73 Ga. 234.

It has been said that such and similar statutes are presumably intended to protect a class of men who are ill-fitted to protect themselves, men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families, and that they should not be extended by forced construction so as to include a class of men who are competent to take care of themselves and need no such protection.

"Muzzle not the ox which treadeth out the corn," denotes a subdivision in the great army of industry which does not include the energetic self-reliant mechanic of this country.

The opinions of our learned brother of the district court always arrest our attention and command our consideration. We have seldom had occasion to differ from his views. In this case, our premises and the authorities at hand, different from his, have led us to a different conclusion, and we are therefore constrained to write a different judgment.

It is therefore ordered, adjudged and decreed that the writs of certiorari and prohibition be perpetuated and the judgment of the district court in this case is avoided, reversed and an-

nulled, and the judgment rendered by the city court is reinstated at costs of the judgment debtor.

Rehearing refused.

As to Whether a Locomotive Engineer is a laborer within the meaning of the exemption laws, see the monographic note to Oliver v. Macon Hardware Co., 58 Am. St. Rep. 307. A street railway conductor has been held to be: Stuart v. Poole, 112 Ga. 818, 81 Am. St. Rep. 81, 38 S. E. 41.

BAER BROTHERS v. TERRY.

[108 La. 597, 32 South. 353.]

CONFLICT OF LAWS—Liability of Married Woman.—If a married woman gives a promissory note in the state of her residence, which is there valid and enforceable against her, it may be enforced in the courts of another state, though if executed there it would not have been valid. (p. 396.)

RES JUDICATA.—A judgment in favor of a wife in an action against her for the purchase price of mules purchased by her for the benefit of her separate estate situate in Louisiana, does not bar a recovery against her in a subsequent action upon a promissory note executed by her in another state, of which she was then a resident, in consideration of the sale to her of the same mules, and which note was valid and enforceable against her where executed. (p. 396.)

Hudson, Potts & Bernstein, for the applicants.

Andrew Augustus Gunby, for the respondents.

598 **BLANCHARD, J.** This suit is the sequel of that entitled "Baer Bros. v. Mrs. G. C. Terry and Husband," decided by this court in May, 1901: See 105 La. 479, 29 South. 886. The parties litigant in that case are the same as the parties litigant in this case, and the facts and circumstances out of which grew that litigation and this are set forth in the opinion of the court in the first suit. It is not deemed necessary to repeat them here in extenso.

The first suit was against Mrs. G. C. Terry, the wife of I. C. Terry, to recover the price of certain mules which it was alleged had been purchased for, and had inured to, her separate account and benefit, and certain promissory notes executed by I. C. Terry and G. C. Terry were annexed to the petition for reference and filed with it. With reference to these notes this court in its opinion in the former case said:

“Defendant is sued as purchaser of the mules, not as maker of the notes; she is sued as a Louisiana wife bound for the price of movables purchased by her for the separate benefit of herself and her paraphernal property, not as a Missouri wife bound on notes executed by her in the state of her domicile, for a debt of her husband. The petition contains not a word of allegation of the laws of Missouri, or of the notes having been executed while defendant was a resident of Missouri.

“These things in order to be proved had to be alleged; and in this we agree with defendant’s counsel. But we differ with the able and learned counsel in his contention that because the notes are made payable in Louisiana, the capacity of the defendant to make them must be tested by Louisiana law. Capacity to contract is tested by the law of the domicile: Rorer on Interstate Law, 263. Nor do we agree with the counsel’s contention that assuming defendant to have been liable on the notes before she came to this state, the law of this state prohibiting wives from binding themselves for the debts of their husbands precludes recovery against her. The law is satisfied and its whole object and purpose is accomplished when Louisiana wives are protected against binding themselves for the debts of their husbands; this protection is not extended to Missouri wives, and if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate, or dissolve, valid obligations; to such it is a healthful and bracing atmosphere.”

599 The plaintiffs were cast in that suit, it appearing, on the proof made, that the purchase of the mules was not by the wife, nor for her account, and that the same did not inure to her separate benefit, nor that of her paraphernal estate. But it was plainly intended, and such is the purport of the language used, that this court, in the former case, did not consider that suit one upon the notes, and that had it been one upon the notes, which were executed in the state of Missouri by defendants, then residents of that state, a different result would, upon proper proof made, have been reached. Following this, plaintiffs brought the present action, which is one based directly upon the notes, which are joint obligations of I. C. Terry and G. C. Terry—husband and wife.

It is represented that these notes are Missouri contracts, executed in that state by the makers thereof, who were at the time residents of Missouri, and that they are enforceable as Missouri contracts under the laws of Louisiana, whither the makers have since removed and now reside. It is further represented that by the laws of Missouri the wife has the legal right to bind herself as a feme sole, and could and did validly bind and obligate herself jointly with her husband for the payment of the notes, and that under the laws of Louisiana plaintiffs are entitled to enforce the obligation springing from the notes in the same manner and to the same extent that they could be enforced in the state of Missouri. It is proved that the makers of the notes were at the time residents of Missouri, and that the notes were executed in Missouri, being dated at St. Louis. It is shown by a statute of Missouri offered in evidence that a wife is capable of binding herself for and with and as security for her husband, as was done in this instance.

Defendants had filed a plea of estoppel and res judicata based upon the judgment rendered in the former suit. Correctly appreciating the views entertained and expressed by this court in its opinion in that case, the district judge overruled the pleas referred to, and rendered judgment in favor of the plaintiffs herein against the defendants jointly for the notes sued on. On appeal to the circuit court of appeals his judgment was reversed, ⁶⁰⁰ and a decree was entered up sustaining defendants' plea of res judicata. We are constrained to hold this was error and that the conclusion reached by the district judge was the proper one under the law and the facts.

It is, therefore, ordered that the judgment of the court of appeals be set aside and vacated, and that the judgment of the district court be reinstated as the proper determination of the issues herein presented—costs of all the courts to be borne by defendants.

Rehearing refused.

The Validity of a Married Woman's contract is usually determined by the law of the state where made. Thus a note signed by a married woman in Missouri to be paid to her son in Indiana is a Missouri contract, to be governed by the laws of that state, and will be enforced, though if made in Indiana it would have been void: See the monographic note to Locke v. McPherson, 85 Am. St. Rep. 566, on conflict of laws as affecting the contracts of married women.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BACON v. BACON.
[181 Mass. 18, 62 N. E. 990.]

WILLS.—The Burden of Proof is on the executor to prove the soundness of mind, and on the contestant to prove undue influence. (p. 400.)

WILLS—Undue Influence.—It is not True that Any Influence Exerted by a Legatee over the testator inducing him to make a will is an undue influence authorizing the setting aside of the will. (p. 400.)

WILLS—Influence and Defective Mental Condition.—It is not true that if an influence is brought to bear on a testator in favor of a will not sufficient to control the mind in a normal condition, but sufficient to control the mind of the testator, so that, taking such influence and the mind of the testator together, the will may be regarded as a product thereof, the will must be rejected, if it does not appear that such influence was an undue influence. (p. 401.)

G. L. Mayberry and F. L. Washburn, for the appellant.

A. F. Butterworth, for the executor.

¹⁸ **LATHROP, J.** This is an appeal from a decree of the probate court, admitting to probate two instruments purporting to be the will and codicil of Sarah A. Bacon. The usual issues were framed by a single justice of this court, and were sent to the superior court for trial. The case was there tried, and the jury answered the issues so as to sustain both the will and codicil; and the case is now before us on the appellant's exceptions to the refusal of the judge presiding at the trial in the superior court to give three rulings requested.

The testatrix died in April, 1900, and was then eighty-three years old. The will was executed on September 28, 1899, and

the codicil on October 6, 1899. In 1894 Mrs. Bacon had made another will, by which she gave all her real estate in Winchester to her husband John H., and the residue of her estate in trust, ¹⁹ the income to be divided during their lives between John H. and her son Edward T. Bacon. In August, 1899, her husband died, and by the will in question, made the following month, she gave her real estate in Winchester to her son Edward T. Bacon, and the residue of the estate, after certain specific bequests, to him as trustee to divide the income between himself and his brother, Alonzo P. Bacon, during their lives, and the life of the survivor, with remainder over to her daughter, Syrena L. Fowler. The codicil merely changed some small bequests.

There was evidence that Edward and Alonzo had spent considerable sums of money for the support and comfort of their father and mother, and that in 1884 Edward, at the request of his parents, returned from California, where he was living, and lived with and took care of them during their lives. Before the will was executed, Alonzo and Edward had lost most of their property. Charles N. Bacon, who contested the will and codicil, was a man of considerable means. It did not appear that he had given his father or mother money, except to make them a yearly present of ten dollars. He had done some plowing and work of that kind for them, and at their golden wedding had sent them a tub of butter. He lived within a few minutes' walk of his mother's house, but did not see her often, and did not call upon her during the last five days of her illness.

There was evidence that shortly before making the will the testatrix had stated to various persons that she had to rely wholly upon Edward, and depended upon him in all her business transactions, and that she did not know what she would do without him, as he was both son and daughter to her.

Edward T. Bacon testified that he and his mother talked over the making of the will, and that, using the will of 1894 as a form to go by, he wrote a memorandum of the provisions of the will in question, and took it to an attorney in Boston, who prepared a draft of the will, which the witness took home: that afterward some changes were made in it, but he could not say what the changes were, nor could he remember what his mother said to him with regard to the provisions of the will, nor designate any particular change that she authorized to be made. He further testified that, after the death of his father, his mother said to him that some changes ought now to be made in her ²⁰ will; that in making the memorandum above stated he fol-

lowed his mother's dictation; that after the first draft of the will was made he took it home and read it to his mother, who directed the changes to be made.

The testimony as to the soundness of mind of the testatrix was what is often found in a case like this. That for the contestant was to the effect that she had been ill from December, 1898, to the last of February, 1899; and that during this time and afterward there was some impairment of her mental faculties; that after her illness various persons, who had known her intimately for years, called upon her and found her unable to recognize or remember them. For the executor the attending physicians testified that she was of sound mind. Several witnesses testified that they often called upon her, and they always found her mind alert, and that she discussed matters of general interest, that she frequently wrote letters with her own hand; and several of these letters written during the fall when the will and codicil were made were put in evidence.

On this state of the evidence, the contestants made three requests for instructions. The first one was not discussed on the brief, nor insisted upon, and we regard it as waived. The second and third were as follows:

2. "If the jury find that Edward T. Bacon exercised any influence over the testatrix which tended to induce her to make the will, the burden of proof is on the party setting up the will to satisfy the jury by a fair preponderance of the evidence that she had sufficient mental capacity to enable her to resist that influence.

3. "If the jury should find that the mental capacity of the testatrix was such that she was capable of executing a will, if left to herself and free from outside influences, and should also find that some influence was brought to bear upon her by her son Edward in favor of this will or certain parts of it, but that such influence would not be sufficient to control a mind in its normal condition, so that neither the loss of mental capacity nor the influence exerted over her by Edward would alone be sufficient to render the will invalid, and yet the jury should find that, taking the two together, the act of the testatrix in making the will was not her free and voluntary act, then they would be warranted in finding that the will was executed under undue influence."

These requests were not given in terms, but the presiding judge charged the jury fully on the question of soundness of mind, reading from the opinion of Chief Justice Cockburn, in

Banks v. Goodfellow, L. R. 5 Q. B. 549, 567, where are cited several cases from courts in this country; and also reading to the jury the charge of Mr. Justice Allen in *Whitney v. Twombly*, 136 Mass. 145, 146 (which was held by the full court to be accurate and sufficient), and stating the law on the subject in his own language fully and accurately. The same is true of what was said in the charge on the question of undue influence. As bearing upon the requests for instructions, it is necessary to refer to the concluding portion of the charge: "You are the judges to determine these two questions submitted here: Whether she was capable of making a will, and whether she made such a will as she wanted to make—that is the question, Was that her will or was that Edward's? If she had not mind enough to make a will, of course your finding will settle the controversy. If she had, then was that mind, whatever its strength, so controlled by Edward that an entirely different will was made from what she would have made? You may consider also as bearing upon that question the will of 1894. You have heard the will of 1894 read and know what it is." The judge further instructed the jury that the burden of proof was on the executor on the issue of testamentary capacity, and upon the appellant upon the question of undue influence. No exception was taken to any part of the charge.

Passing, then, to a consideration of the second and third requests, we are of opinion that they were properly refused. The second request, if given, would have tended to mislead the jury. The burden of proof was on the executor to prove soundness of mind, and on the contestant to prove undue influence, and so the jury were instructed. While there is some conflict of authorities in other jurisdictions on the question of the burden of proof, where undue influence is alleged, there is none in this commonwealth: *Baldwin v. Parker*, 99 Mass. 79, 87, 96 Am. Dec. 697; *McKeone v. Barnes*, 108 Mass. 344; *Davis v. Davis*, 123 Mass. 590, 598. The request is also misleading in using the language "any influence" which tended to induce her to make this will." A will is not to be set aside because some influence is used by a devisee or legatee; but undue influence must be shown to accomplish this result: *Hall v. Hall*, L. R. 1 P. & D. 481; *Parfitt v. Lawless*, L. R. 2 P. & D. 462; *Wingrove v. Wingrove*, 11 P. D. 81; *Boyse v. Rosborough*, 6 H. L. Cas. 2, 48, 49.

We are further of opinion that the third request was properly

refused. It disregards the difference between influence and undue influence. It says in effect that if the jury should find that the testatrix was of sound mind and no undue influence was used, they might find that undue influence was used. It is undoubtedly true that a person may be of sufficient capacity to make a will, if let alone and not unduly influenced, and yet not of sufficient capacity if unduly influenced. And it is also true that in determining whether influence is lawful or unlawful regard is to be had to the condition of mind and body of the person upon whom the influence is exerted: *Griffith v. Diffenderffer*, 50 Md. 466, 480. See, also, *Mooney v. Ilsen*, 22 Kan. 69. But this was not the case put by the request. So far as the request relates to the requirement that the will and codicil should be the free and voluntary act of the testatrix, it is fully covered by the portion of the charge which we have cited.

Exceptions overruled.

Undue Influence, as affecting the validity of wills, is considered in the monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691. The burden of proving that a will is the result of undue influence is upon the contestant who makes the charge: *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604, and cases cited in the cross-reference note thereto. Undue influence cannot be inferred alone from motive or opportunity: *In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413. And it must, in order to invalidate the will, in some measure destroy the free agency of the testator: *Englert v. Englert*, 198 Pa. St. 326, 82 Am. St. Rep. 808, 47 Atl. 940.

Testamentary Capacity is presumed, so that it is not incumbent upon the proponent of a will to prove the sanity of the testator: *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16.

HASKELL v. AVERY.

[181 Mass. 106, 63 N. E. 15.]

NEGOTIABLE INSTRUMENTS—Indorsement of, What is.—The words "for deposit in the National Bank of Florida to the credit of E. J. Neher," written by him on the back of a note or draft, constitute a sufficient indorsement on his part, and give the bank the title to the note and the power to transfer it by indorsement. (p. 403.)

NEGOTIABLE INSTRUMENTS.—The Fact that the Indorsement of a Negotiable Note does not Contain the Words "Or Order" does not limit the power of the indorsee to also indorse and transfer it. (p. 403.)

NEGOTIABLE INSTRUMENT—Indorsement of by the Indorsee Under a Restricted Indorsement.—If a note or draft is indorsed to a bank, to the credit of the indorsee, it has power to indorse and transfer the paper to another. Such indorsement is subject to the trust to hold the proceeds for the original indorser. (p. 403.)

NEGOTIABLE INSTRUMENTS.—The Indorsement of a Draft or Note by a Bank for Its Collection Account authorizes the indorsee to sue thereon, or to prove it in its own name as a claim against the estate of a decedent. (p. 403.)

Claims against the estate of Edward Avery on a note and draft. The note and the indorsement thereon were as follows: "\$155. Boston, May 6th, 1895.

"Four months after date I promise to pay to the order of Edward Avery one hundred and fifty-five dollars. Payable at any bank in Boston. Value received.

"JAMES T. MOORE."

"Pay to the order of William B. Avery.—Edw. Avery.

"Pay to the order of Miss Ida Avery.—Wm. B. Avery.

"Pay to the order of Mr. E. J. Neher.—Ida Avery.

"For deposit in the National Bank of the State of Florida, Jacksonville, Fla., to the credit of E. J. Neher.

"For collection account National Bank, State of Florida, Jacksonville, Fla. Thos. P. Denham, Cashier."

The draft and its indorsements were as follows:

"\$185.00. Keuka, Fla., April 7th, 1894.

"At (10) ten days' sight pay to the order of E. J. Neher \$185, one hundred and eighty-five dollars. Value received and charge the same to account of Wm. B. Avery. To Hon. Edward Avery, Exchange Building, State St., Boston."

Across the fact was written: "Accepted.—Edw. Avery."

"E. J. Neher.

"For deposit in National Bank of the State of Florida, Jacksonville, Fla., to the credit of E. J. Neher.

"Pay American Nat'l Bank, New York, or order for credit acct. Nat'l Bank of State of Fla., Jacksonville, Fla. Thos. P. Denham, Cashier.

"For collection account Amer. Exch'ge National B'k, New York. Edward Burns, Cashier. Apr. 12, 1894."

The commissioners disallowed the claims, and an appeal was taken to the superior court, which affirmed their action, and the creditor, Elmer E. Haskell, alleged exceptions.

U. G. Haskell, for the appellant.

E. Paul, for the appellee.

¹⁰⁷ HOLMES, C. J. The only question is whether the holder of the note and draft can prove in his own name. To decide this it is necessary to consider the purport and effect of two indorsements. The first is that of Neher: "For deposit in the National Bank of the state of Florida, Jacksonville, Fla., to credit of E. J. Neher." Neher's name is a signature, although it also makes part of a sentence. The signature is often made part of the last sentence of a letter, but no one ever thought, we suppose, that it was less a signature on that account. The indorsement then is in effect the same as if it read "or deposit . . . to my credit. E. J. Neher." Such an indorsement is restrictive in the sense that it gives notice of the trust to anyone who should take the note thereafter, and therefore makes it impossible for one who should discount it for the holder to retain the proceeds, when collected, to his own use: *Lloyd v. Sigourney*, 5 Bing. 525. But there seems to be no reason for denying that it gave to the Florida National Bank the right to collect the note and ¹⁰⁸ to that end to bring a suit, if necessary, in its own name: *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 12, 30 N. E. 176. In other words, there seems to be no reason for denying that it gave the bank the legal title to the note, as the bank certainly would have owned the proceeds of the note when collected, and thereafter would have been simply a debtor to Neher for the amount. It does not matter if the title was voidable in case the depositor should have seen fit to revoke his mandate, or the bank had returned the paper upon a failure to collect.

If these preliminaries are admitted, there is not much more difficulty in taking the next step. The very purpose of indorsing a note payable in Boston to a Florida bank for deposit is that the Florida bank should get the note collected and make itself the depositor's debtor by the usual measures. Those, it is well known, are the indorsements through intervening banks to a bank or person in Boston. The fact that the words "or order" were not added did not of itself limit the power of the bank to indorse: *More v. Manning*, 1 Comyn, 311; *Acheson v. Fountain*, 1 Strange, 557; *Edie v. East India Co.*, 2 Burr. 1210; *Leavitt v. Putnam*, 3 N. Y. 491, 53 Am. Dec. 322. And the fact that the indorsement to the bank was restrictive in the sense that it disclosed a trust did not prevent the bank from passing the legal title subject to the trust to the Boston bank or person ultimately called upon to collect. This is in accordance with reason, has the sanction of Massachusetts au-

thority, as well as of other courts, and seems to be established as the law for future transactions by statute: *Freeman's Nat. Bank v. National Tube Works*, 151 Mass. 413, 417, 21 Am. St. Rep. 461, 24 N. E. 779; 1 *Daniel on Negotiable Instrument*, 4th ed., sec. 698d, note 4; R. L., c. 73, secs. 53, 54. See *National Pemberton Bank v. Porter*, 125 Mass. 333, 335, 28 Am. Rep. 235.

The second indorsement to be considered is the last appearing upon the paper. It is by a New York bank, "for [its] collection account." The indorsement is in blank, and there is less doubt than in the former case that the words "for collection account" do not preclude the holder from suing or proving in his own name: *Freeman's Nat. Bank v. National Tube Works*, 151 Mass. 413, 417, 21 Am. St. Rep. 461, 24 N. E. 779; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11, 12, 30 N. E. 176.

For these reasons the appellant should have been allowed to prove his claim.

Exceptions sustained.

The Effect of Indorsing checks for deposit is considered in *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, and note. As to restricted indorsements of negotiable paper, see *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 54 Am. St. Rep. 59, 17 South. 728; *United States Nat. Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 75 N. W. 1088. Indorsement for collection passes title only so far as to enable the indorsee to demand, receive, and sue for the money to be paid: *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779; *People's etc. Bank v. Craig*, 63 Ohio St. 374, 81 Am. St. Rep. 639, 59 N. E. 102.

BROWN v. GREENE.

[181 Mass. 109, 63 N. E. 2.]

STATUTE OF LIMITATIONS Against the Claim of an Executor.—If an executor has a claim against the estate of a decedent, he has a right to retain it out of the assets, and the special statute barring claims unless presented within two years does not apply against such right of retaining. (p. 406.)

Petition filed May 28, 1901, by an executor for the allowance of his claim against the estate of his testate, which was admitted to be insolvent. The decedent died December 19,

1898, and the will was proved January 12, 1899, and the executor appointed and gave bond February 10th of the same year. In the probate court the petition was dismissed, and the petitioner appealed. The case then came on to be heard before Barker, J., who reserved it on agreed facts and requests for rulings.

A. E. Burr and A. A. Highlands, for the petitioner.

J. Cummings, for the respondent.

109 HOLMES, C. J. This is an appeal from a decree of the probate court disallowing a claim of the petitioner against the estate in his own hands as executor. More than two years after he was appointed and gave bond he represented the estate insolvent, and subsequently filed a petition for the allowance of his claim, we presume under Public Statutes, chapter 136, section 6. The claim is disputed only on the ground that it was not presented within **110** two years under Public Statutes, chapter 136, section 9, and the question before us is whether the special statute of limitations applies to a personal claim of the executor himself against the assets in his hands.

We are of opinion that so far as appears the claim was not barred. The right of retainer is recognized in this commonwealth: *Foster v. Bailey*, 157 Mass. 160, 164, 31 N. E. 771; *Newell v. West*, 149 Mass. 520, 528, 21 N. E. 954. And although, if the executor's debt is disputed, he must file a statement of his claim (Public Statutes, chapter 136, section 6), and although if the estate is represented insolvent, he ought to proceed as pointed out in *Green v. Russell*, 132 Mass. 536, 541, and *Newell v. West*, 149 Mass. 520, 529, 21 N. E. 954, these are merely special requirements for special cases, and do not make any formal proof or claim within two years necessary in order to preserve his rights. When the right of retainer is recognized without qualification it seems to follow logically that the statute will not run against an executor's claim.

In *Attorney General v. Hooker*, 2 P. Wms. 338, 340, the lord chancellor laid it down that "the law says, and the general notion of mankind is, that the making a man executor is giving him all." If the executor when he took the place of the heir received his testator's property in his own right, as some things seem to indicate, then of course his claim at once became an item in a mutual credit, and he would not have been bound to pay over more than the balance of the account. From this point of view the mode of accounting has not changed with

the supposed change of the executor's position from owning in his own right to a fiduciary holding in *autre droit*. But the latest opinion which we have seen expressed by historical investigators is adverse to the executor's ever having held in his own right (Goffin on Testamentary Executor, 55), and it is not very material for the present decision how the fact may have been. The executor at least has the legal title to the goods from which he seeks satisfaction, and those goods are charged with liability for his claim in common with the other debts of the testator. Apart from statute, it cannot be necessary for him to do more in order to secure the right to hold them until his claim is satisfied: *Sanderson v. Sanderson*, 17 Fla. 820, 847; *McLaughlin v. Newton*, 53 N. H. 531; *Spencer v. Spencer*, 4 Md. Ch. 456, 464, 465; *Matthews v. Matthews*, 46 Miss. 239, 6 South. 201. See ¹¹¹ *Miller v. Irby*, 63 Ala. 477, 483; *Thomas v. Chamberlain*, 39 Ohio St. 112, 122. The doctrine is implied in *Newell v. West*, 149 Mass. 520, 529, 530, 21 N. E. 954, where the claim was more than two years old when presented. And in *Grinnell v. Baxter*, 17 Pick. 383, 385, it was intimated by Chief Justice Shaw that taking administration and having the estate in his own control should be deemed equivalent to bringing a suit for the purpose of saving a claim not barred when administration was taken out.

Of course debts due to an executor must appear ultimately in his account: *Buckley v. Buckley*, 157 Mass. 536, 537, 32 N. E. 863. But they are not lost by not appearing there within two years, and there is nothing more required to be done until they appear there and are disputed by some one interested in the estate.

Decree of probate court reversed.

An Administrator who claims against the estate stands upon the same footing as the other creditors: *McNeill v. McNeill*, 26 Ala. 109, 76 Am. Dec. 320. An executor cannot retain for a debt due himself unless, in addition to the usual proof, he swears to the existence of the debt, after allowing all payments and offsets, if the debt is not admitted by the adverse party: *Clark v. Clark*, 8 Ind. 152, 35 Am. Dec. 676. And an administrator or executor cannot lawfully retain a debt due him from the estate which was barred by the statute of limitations before he administered: *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716.

DICKINSON v. INHABITANTS OF BROOKLINE.

[181 Mass. 195, 63 N. E. 331.]

DOMICILE Cannot be Controlled by Intent Merely. Hence one who is present with his family in a house in one town, and intends to make his actual headquarters there for the rest of his life and to live no more in the town of his former domicile, cannot retain his old domicile by merely intending and desiring so to do and by voting there. (p. 408.)

E. B. Farr, for himself.

C. A. Williams, for the defendant.

195 HOLMES, C. J. This case comes here upon exceptions to a refusal to direct a verdict for the plaintiff. The technical answer to such a request is obvious, that the jury may not believe the plaintiff's testimony. But in this case the testimony, which came wholly from the plaintiff himself, was so perfectly candid that the counsel for the defendant very properly did not rely upon a merely technical answer, but argued that the plaintiff's statement at least was consistent with the verdict for the defendant, and that the refusal of the ruling was right on that ground.

It is an action to recover taxes paid under protest, on the ground that the plaintiff was not an inhabitant of Brookline on May 1, 1899, the date of the assessment. The facts are simple. The plaintiff was domiciled in Boston. In or before April, 1890, he probably changed his domicile to Cohasset, and for some years spent four or five summer months in the former place and the rest of the year in Brookline. Since 1895, or 1896, he has let **196** his Cohasset house and has permanently inhabited only the Brookline house, which seems to be the more important structure of the two, and stands in the name of the plaintiff's wife. He has continued to vote in Cohasset, and has intended, so far as consistent with the facts, to remain an inhabitant of Cohasset.

Of course the argument for the plaintiff is that his domicile is presumed to continue until it is proved to have been changed, that it could be changed only by his intent and overt act, and that he expressly denied the intent. The ambiguity is in the last proposition. The plaintiff did not deny that he intended to keep on living as he had lived for the last few years, and if the jury saw fit to find, as no doubt they did, that he did intend

to do so, then he did intend the facts necessary to constitute a change of domicile, and what he did not intend was simply that those facts should have their inevitable legal consequence. If a person is present with his family in a house in Brookline and intends to make his actual headquarters there for the rest of his life, and to live no more in the place of his former domicile, he cannot retain the old domicile by the simple means of intending, subject to his actual change, to retain advantages inconsistent with it. The proposition hardly needs illustration. When you intend the facts to which the law attaches a consequence, you must abide the consequence, whether you intend it or not. Of course, if hereafter, upon the recurrence of this question, Mr. Dickinson is prepared to state that he never has given up his expectation of actually living in Cohasset, while that testimony would not take away the town's right to go to the jury, it may lead to a different result.

Exceptions overruled.

The Question of Domicile is largely a matter of intention: *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423. Intention alone, however, does not control. If a person removes to another place with an intention of remaining there for an indefinite time, it becomes his place of residence or domicile, notwithstanding he may have a floating intention of returning to his old residence at some future time: See the monographic note to *Berry v. Wilcox*, 48 Am. St. Rep. 714.

CRONIN v. FITCHBURG AND LEOMINSTER STREET RAILWAY COMPANY.

[181 Mass. 202, 63 N. E. 335.]

EVIDENCE—Hearsay as to Symptoms and Sufferings of the Plaintiff.—A physician called to testify as an expert may state the symptoms and sufferings of the plaintiff as described by him, though made long after the injuries for which he seeks to recover were received, such statements being part of the grounds on which the expert has reached the conclusion which he is permitted to state to the jury. (pp. 409, 410.)

Action to recover for personal injuries sustained September 27, 1898. At the trial Dr. Frank C. Richardson was shown to be an expert who had made a specialty of nervous diseases.

He testified to an examination of the plaintiff, May 18, 1901, and, against the objection of the defendant, was permitted to state what the plaintiff told him on such examination, as follows: "He complained of suffering considerable pain in the right leg, of backache on slight exertion, severe pain in the left side of the head, muscular weakness; that he tired easily; that his sleep was restless and troubled; that he could not sleep more than two hours at a time during a night; that he was nervous, excitable, emotional, easily startled; that he could not concentrate his mind on anything for more than a few minutes; that he had periods of tremor of the whole body, muscular twitchings and mild hysterical attacks."

The witness, against a like objection, testified to an examination made in October, 1901 as follows: "I examined him in my office in the presence of Dr. Goray last evening; he stated that he could see no change in his suffering from last spring; that he still had pain in his head, pain in his leg; that the pain in his leg had largely given way to numbness; that he had not attempted to work because even slight exertion, as in work about the house, tires him; that his sleep is restless and troubled; that he cannot concentrate his mind any better than last spring; that he still has attacks of trembling and muscular twitching." The witness also gave his opinion respecting the physical condition of the plaintiff.

On cross-examination the expert further testified that he had made two examinations of the plaintiff and that both were for the purpose of testifying in the case. Verdict and judgment for the plaintiff and defendant alleged exceptions.

C. F. Baker, W. P. Hall and W. Wells, for the defendant.

J. E. Cotter, for the plaintiff.

203 BARKER, J. It is plain that the statement by a party to a cause of his bodily and nervous symptoms made long after the occurrence of the accident to which he attributes them and for purposes connected with the preparation for trial of a suit in which his condition of health is material, and not made to a physician for the purpose of obtaining advice or treatment, are not admissible in evidence in his own favor as proof of the truth of the matters stated.

It is equally plain that every person admitted as an expert to testify to his opinion may state in his testimony the grounds and reasons for that opinion, and that the party calling the expert **204** may put in evidence those grounds and reasons in

the direct examination of the expert, and before calling upon him to give his opinion to the jury.

The statement of these rules as to the examination of witnesses called as experts, made by Chief Justice Bigelow in *Barber v. Merriam*, 11 Allen, 322, 324, has since the decision of that case been considered as law in this commonwealth and has governed trials. So well established is this doctrine that the expert, upon direct examination and before giving his opinion in evidence, may testify to the matters which form the grounds and reasons of that opinion that in *Koplan v. Boston Gas Light Co.*, 177 Mass. 15, 21, 58 N. E. 183, this court overruled without discussion an exception to testimony so given, and which, save as showing the grounds of the opinion about to be given by the witness, would have been inadmissible.

In the present case there is no doubt that the statements of the plaintiff were hearsay, and of that particularly dangerous and objectionable type, declarations of an interested party, made after suit brought and for the very purpose of preparing evidence to be used in his own favor at the trial. But no such rule applies to them as that which excludes private conversations between husband and wife, or communications between attorney and client. They may be admitted in evidence if offered by the adverse party either as admissions, or as contradictions of the testimony of the person who makes them. It follows that they may be admitted as the grounds and reasons of an opinion given in evidence or to be so given by an expert.

Being admissible for that purpose, the exception to their admission was not well taken.

Exceptions overruled.

A Physician Called to Testify as an expert may give an opinion as to the nature and extent of an injury sustained to the person, though based in part on statements made to him by the person injured descriptive of present pains or symptoms: *Louisville etc. Ry. Co. v. Snyder*, 117 Ind. 435, 19 Am. St. Rep. 60, 20 N. E. 284; note to *Birmingham Union Ry. Co. v. Hale*, 24 Am. St. Rep. 752. But see *Stewart v. Everts*, 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W. 1092.

BAIN v. ATKINS.

[181 Mass. 240, 63 N. E. 414.]

CREDITORS' BILL to Reach Satisfied Obligation.—A suit in equity cannot be sustained to reach an obligation and apply it to the satisfaction of the plaintiff's demand, if such obligation had been discharged before the suit was commenced. (p. 412.)

INSURANCE—When not Impressed with a Trust.—An insurance indemnifying one for his liability to persons who might be injured through his negligence is not, on the occurrence of such an injury, impressed with a trust in favor of the person injured. The insurer is therefore at liberty to settle with and pay to the insured such sum as they may in good faith agree upon, and such payment being made, the person injured has no recourse against the insurer. (p. 413.)

Suit in equity commenced in 1898, by an infant who had recovered a judgment against the defendant Atkins, to reach and apply insurance for five thousand dollars under a policy issued to Atkins by the defendant, the Union Casualty and Surety Company.

The defendant Atkins was a contractor and builder engaged in putting an additional story on a certain building, and in the prosecution of this work one of his workmen negligently allowed a brick to fall upon and injure the plaintiff. On account of this injury the plaintiff brought an action and recovered judgment against Atkins, who, previous to the accident, had been indemnified by a policy issued by the defendant insurance company. It had assumed the defense of the action and had made an offer of compromise to the plaintiff in behalf of the defendant Atkins, which was rejected. Judgment was afterward recovered against him for seven thousand dollars. Subsequently the insurance company made a settlement with the defendant Atkins and paid him five thousand dollars in discharge of its liability to him, which settlement was made in good faith but without any notice to plaintiff or any notice from him forbidding the settlement. The settlement was not, however, made for the purpose of enabling Atkins to avoid his liability to the plaintiff or to enable the insurance company to avoid its liability, if any. The case was tried before Morton, J., who, with the consent of the parties, reserved it for the consideration of the full court.

W. B. Grant and T. H. Buttimer, for the plaintiff.

R. W. Nason, for the defendant insurance company.

242 BARKER, J. It is now settled by the findings and the agreed facts that when the plaintiff began this attempt to reach in liquidation of his claim against Atkins a supposed obligation to Atkins on the part of the Union Casualty and Surety Company that obligation was no longer in existence. The bill was filed on January 19, 1898. Nine days before that date the supposed **243** obligation, disputed by the company, had been ended by an actual payment of money then made by the company to Atkins on a settlement in good faith on the part of both and without notice to either of any claim on the part of the plaintiff in the obligation or founded upon it. The settlement was not made for the purpose of enabling Atkins to avoid his liability to the plaintiff nor of enabling the company to avoid any liability to the plaintiff. When it was made the company had no knowledge of Atkins' financial condition. The settlement is found to have been made as in the ordinary course of business between two parties, one of whom denied all liability and wanted to settle for as little as it could without injuring its reputation for fair dealing with those who insured with it, and the other of whom wanted to get all he could up to the full amount of his claim. Atkins put into his business the three thousand dollars which he received in the settlement, and had it not been for the judgment of seven thousand dollars afterward recovered against him by the plaintiff in the action of tort for personal injuries then pending, Atkins could have gone on with his business. He went into bankruptcy in consequence of that judgment, and has paid nothing upon the judgment, and the plaintiff has been unable to collect the judgment in whole or in part.

We do not consider whether, if when the bill was brought the company had been under an existing obligation to indemnify Atkins against the plaintiff's demand, the latter could have compelled in equity the application of that obligation to the satisfaction of his claim against Atkins. The fact that when the plaintiff sought the aid of an equity court there was no such obligation is conclusive against the contention that there was an equity springing from such an obligation.

Therefore the plaintiff is compelled to contend that the obligation of the company upon the happening of the accident constituted a fund for the benefit of the plaintiff impressed with a trust for him; that such a trust fund could be paid to Atkins if at all only to reimburse him after he had satisfied his own liability to the plaintiff, and that the company's settle-

ment with Atkins without the consent of the plaintiff was in the company's own wrong and void as to the plaintiff.

The essence of this contention, without which no part of it ²⁴⁴ can stand, is that the insurance constituted a trust fund for the benefit of the plaintiff, and for this there is no ground.

The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which would give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins.

Most of the cases cited in support of the plaintiff's contention are entirely wide of the mark. In all of them the obligation which the plaintiff sought to apply to the extinguishment of his demands existed when he brought his suit.

In *Anoka Lumber Co. v. Fidelity etc. Co.*, 63 Minn. 286, 65 N. W. 353, *Hoven v. Employers' Liability Assur. Co.*, 93 Wis. 201, 67 N. W. 46, and *Fritchie v. Miller's Pennsylvania Extract Co.*, 197 Pa. St. 401, 47 Atl. 351, the liability of the insurer was sought to be reached by process of garnishment. In *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051, and *Fidelity etc. Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420, the question was whether the insured must first pay the judgment in favor of the employé before an action could be brought upon the policy. In *Fenton v. Fidelity etc. Co.*, 36 Or. 283, 56 Pac. 1096, the action against the insurer by a surgeon who had attended an

injured employé was allowed because of an assignment to the plaintiff of the cause of action. In *Embler v. Hartford* ²⁴⁵ *Steam Boiler etc. Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, the decision was that a suit could not be maintained by an assignee of the administratrix of an employé who had been killed by an explosion against the insurer upon a policy issued to the employer. The decision was put by the majority of the court upon the ground that there was no such relation between the employé and his employer, and no such privity on the part of the employé to the contract of insurance as gave him or his representatives a right of action upon the policy of insurance. It is to be noted that this policy was written before the enactment of the New York Statutes of 1892, chapter 690, section 55, which authorizes an employer to take out insurance for the benefit of his employés. The case of *Beacon Lamp Co. v. Travelers' Ins. Co.*, 61 N. J. Eq. 59, 47 Atl. 579, was overruled by the court of last resort, which held that the obligation of the insurer was with the employer only, and left the person who had the claim for damages on account of the accident to rely only on obligations from the insurer to the employer existing when the bill was brought: *Beacon Lamp Co. v. Travelers' Ins. Co.*, 61 N. J. Eq. 59, 47 Atl. 579. *Hunt v. New Hampshire Fire Underwriters' Assn.*, 68 N. H. 305, 73 Am. St. Rep. 602, 38 Atl. 145, grew out of the reinsurance by a solvent company of part of a fire risk first reinsured in part by a company which became insolvent after the loss by fire; and the right of the original insurer to the fund was a right in equity to avail itself of a then subsisting provision made by his insolvent debtor, the first reinsurer, for the payment of the claim of the original insurer. Neither that case nor those of the class of *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199, or *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. Rep. 494, are put upon the ground of a trust.

If the usual result of insurance against liability for damages respecting accidental injuries to others was to give money to the insured when he was not obliged to compensate the person injured, it would be for the legislature to say whether such insurance should not be prohibited as contrary to public policy. The insurance written by the policy held by Atkins was in fact permitted by our statutes and for his own benefit, and not for that of the persons whose injuries might give them a claim against him. The fact that owing to his bankruptcy the plaintiff's claim cannot be satisfied, although he has in fact received

the insurance money or a part of it, cannot make that a trust fund which ²⁴⁶ neither the statute which allowed the contract nor the contract which created the fund impressed with a trust. Atkins had as full a right to settle with the company and to use in his business the proceeds of the settlement as to deal at his will with any other part of his property, and the company had a right to settle with him as it did.

Bill dismissed with costs.

Casualty Insurance.—In an action to recover for personal injuries claimed to be due to the negligence of the defendant, it is error entitling him to a reversal to admit, against his objection, testimony showing that in case of recovery he is indemnified from loss by a policy in a casualty insurance company: *Herrin, Lambert & Co. v. Daly*, 80 Miss. 340, post, p. 605, 31 South. 790. That a contract to indemnify one from liability for negligence may be valid, see *Kansas City etc. R. R. Co. v. Southern etc. Co.*, 151 Mo. 373, 74 Am. St. Rep. 545, 52 S. W. 205.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK v. CUTTING.

[181 Mass. 261, 63 N. E. 433.]

MANDAMUS Will not Issue Against the Insurance Commissioner to Compel Him to Change His Valuation of outstanding policies issued by the petitioner, on the ground that he has made a mistake of law or of fact, where it is not contended that he has acted in bad faith or willfully disobeyed the law. (p. 419.)

T. B. Reed, L. S. Dabney and R. Foster, for the petitioner.

F. H. Nash, attorney general, for the respondent.

²⁶¹ **KNOWLTON, J.** This is a petition for a writ of mandamus to compel the insurance commissioner to change his valuation of the outstanding policies of the petitioner, so as to diminish the reserve liability for which it must have assets to meet the requirements of our law. The duty of the commissioner to make this valuation under the R. L., chapter 118, section 11, is only a preliminary part of his duty under section 17 of this chapter, annually to "make a report to the general court of his official transactions," in which he shall include among other things "an exhibit of the financial condition and business transactions of the several insurance companies as disclosed by official examinations of the same or by their annual statements,

abstracts of which statements ²⁶² with his valuation of life policies, shall appear therein; and such other information and comments relative to insurance and the public interest therein, as he thinks proper." It is important in one other way. It naturally is used in part as a foundation for action, in case he is called upon under section 7 to revoke or suspend the certificates and authority granted to a foreign insurance company, because he is of opinion that it is "in an unsound condition," or "that its actual funds exclusive of its capital . . . are less than its liabilities."

The complaint against the respondent is that in applying the rule of computation prescribed by the statute to a certain class of policies issued by the petitioner, he has made a mistake in holding that, for the purpose of ascertaining their reserve value, they are to be treated as being from their inception policies for life or for an endowment period, and not as policies for one year only, with an option in the assured to continue them in force at the end of the year without a further physical examination, and without an increase of premium on account of the greater age of the assured. It is not contended that he has acted in bad faith or has willfully disobeyed the law. There is only a difference of opinion between the petitioner and the respondent as to the proper application of the rule prescribed by the statute, to the methods of the petitioner in insuring under this class of policies.

A preliminary question is whether the decision of the commissioner in a matter of this kind is subject to revision by this court on an application for a writ of mandamus. In various proceedings affecting foreign insurance companies the statute makes no provision for an appeal from its decision, but treats his conclusion as final. Particularly is this so in the valuation of policies and assets and the determination of the financial condition of foreign companies doing business in this commonwealth. "Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is otherwise duly qualified under the laws of this commonwealth to transact business herein": R. L., c. 118, sec. 6. By the R. L., chapter 120, section 10, he has absolute authority to give or withhold his indorsement ²⁶³ upon a requisition of the directors for the withdrawal of any portion of an emergency fund deposited by an assessment insurance

company with the treasurer of the commonwealth. Under R. L., chapter 120, section 12, the authority granted to a foreign assessment insurance company to do business in this commonwealth "shall be revoked if the insurance commissioner, on investigation, is satisfied that such corporation is not paying in full the maximum amount named in its policies, or that it has otherwise failed to comply with any provision of this chapter or its own contracts." In regard to the reduction of capital stock of an insurance company, it is provided by the R. L., chapter 118, section 37, that, "if the commissioner finds that the reduction is made in conformity to law, and that it will not be prejudicial to the public, he shall indorse his approval upon the certificate." By section 67 of this chapter, a company organized under the laws of another state may be admitted to do business in this commonwealth, if, "in the opinion of the commissioner," it "is in sound financial condition," etc. Section 72 provides that "no domestic life insurance company shall reinsure its risks except by permission of the insurance commissioner; but may reinsure not exceeding one-half of any individual risk." Under section 78 "no foreign insurance company shall be so admitted and authorized to do business until . . . it has satisfied the insurance commissioner" or numerous facts therein stated. The terms of each of these sections make it plain that the opinion and judgment of the insurance commissioner is to be final and conclusive in determining these important matters upon which the rights of the insurance companies and the protection of the public depend. Most, if not all, of these several conclusions involve the consideration of questions of law as well as questions of fact.

In regard to the only important action depending upon the valuation of policies to ascertain the reserve liability of insurance companies, namely, the making of a report to the legislature and the revocation or suspension of certificates of authority to do business, it seems that the judgment of the commissioner is not subject to revision. Under section 17, he is to make a report of the financial condition of insurance companies and of their transactions and the valuation of life policies, which must mean a report according to his understanding of the facts, founded on ²⁶⁴ examinations and statements. By section 7 he is to revoke or suspend certificates of authority granted to a foreign insurance company if he "is of opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, that it has failed to com-

ply with the law, or that its actual funds exclusive of its capital, if it is a life insurance company, are less than its liabilities," etc.; and no new business can thereafter be done by such company "until its authority to do business is restored by the commissioner." If the "ground for revocation or suspension relates only to the financial condition or soundness of the company, or to a deficiency in its assets," there is no appeal from a decision of the commissioner. In other cases the company may apply to the supreme judicial court for a reversal of his decision. Here again is an indication that the judgment of the commissioner in all matters of law or fact involved in determining the financial condition of a company for a purpose affecting it, even to the extent of terminating its existence as an insurer in this commonwealth, is to be final and conclusive.

The valuation of policies for the purpose of determining the reserve liability is only one of the processes necessary to determine the company's financial condition. It involves an application of the statutory rule to each policy, in connection with the methods and practices in the transaction of the business that exist, either as a part of the science of life insurance or otherwise, outside of the stipulations of the policy. New forms of policies may be adopted which were not known when the statutory rule was established, and new questions may arise, depending in part upon the principles of life insurance as a science, and in part upon the practices of the company as well as upon rules of law, in determining how the statutory rule shall apply to these policies. In the present case, even if the contracts referred to are to be considered technically as the petitioner contends, the statute is silent as to whether the value of the option to continue the insurance at the end of the year without an examination, and at the premium fixed for an age a year younger than the assured would then have attained, is not to be considered in determining the reserve liability of the company under the contract. Questions of fact and questions of law must be answered ²⁶⁵ in coming to a conclusion. In valuing all the assets of a company, which usually comprise investments of many kinds, such questions must inevitably arise. If we are to examine each policy or class of policies, together with the methods of the company in fixing their premiums, and any other facts pertaining to the policies which are different from those belonging to other kinds of policies, for the purpose of determining whether the insurance commissioner has made a mistake of law in valuing them, we know of no good reason

why his valuation of each item of the assets might not be examined to see if it is affected by a mistake of law. A mistake of the latter kind might be as detrimental to the company as one of the former, whether viewed in reference to its effect upon the commissioner's report, or upon his determination to revoke or suspend the certificate of authority. If the commissioner's mistakes of law are to be corrected on an application for a writ of mandamus, his mistakes in the construction of contracts entering into investments should be dealt with, as well as his mistakes in the construction of contracts for insurance. We are of opinion that the statute does not contemplate a revision of the commissioner's decisions in this way. This officer is intrusted with the performance of important duties, and invested with power to use his discretion and judgment in matters which call for prompt and decisive action, and which it would be difficult to investigate in our courts. We are of opinion that at least so long as he acts in good faith, intending to obey the law, we cannot, by a writ of mandamus, compel him to change his conclusions either of law or fact in the valuation of the policies or assets of a life insurance company.

Without considering whether any mistake appears, we must deny the petitioner's application. Similar decisions have been made in regard to the powers of the insurance commissioner in Ohio and Kansas: *State v. Moore*, 42 Ohio St. 103; *Dwelling-house Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 261.

Petition dismissed.

Mandamus Will not Issue to an insurance commissioner to compel him to admit a foreign insurance company to do business in the state: American etc. Security Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494.

NORRIS v. ANDERSON.

[181 Mass. 308, 64 N. E. 11.]

ATTACHMENT.—Misnomer of the Defendant, whereby his name is spelled "Kavarik" instead of "Kovarik," while a proper matter for a plea in abatement, does not make void the writ or its levy on his real property, even against an innocent purchaser without actual notice. (p. 422.)

ATTACHMENT.—The Description of Land Given in a Return of a Writ of Attachment is sufficient if the same description would be sufficient to pass the land in a grant made by the owner. This rule applies against purchasers in good faith of the property after the levy of a writ without actual notice thereof. (p. 422.)

ATTACHMENT.—The Amendment of a Writ of Attachment After Its Levy by correcting a misnomer of the defendant, though made without notice to him or to a purchaser after its levy, does not avoid the writ or the levy against either, for the reason that it and its levy would have been valid had no amendment been made, unless the misnomer had been pleaded in abatement. (p. 423.)

ATTACHMENT—Amendments to Cure Mere Defects in Form or Clerical Errors do not Affect an Attachment.—To dissolve an attachment or make it ineffectual as against a subsequent purchaser, surety, or attaching creditor, the amendment must be such as to let in some new demand or cause of action. (p. 423.)

Writ of entry to recover premises in Wood street in the town of Woburn. Both parties claimed under John Kovarik. The defendant claimed title under a writ of attachment levied October 16, 1899, and the tenant under a conveyance made to him on the twenty-seventh day of the same month. Before accepting a conveyance the tenant caused an examination of the title to be made, and received a report to the effect that it was free from attachment. In the writ the debtor's name was incorrectly spelled "Kavarik," which was probably the cause of the failure to find and report the attachment. On the return day of the writ, the plaintiff therein, one Alexander Ellis, moved the amendment of the writ by changing the name of the defendant from "Kavarik" to "Kovarik," and the motion was allowed by the court, no notice thereof having been given to anyone. The tenant had purchased in good faith in ignorance of the attachment. After judgment was entered in the attachment suit, a writ of execution issued under which the property in controversy was sold to the defendant, who was the attorney for the plaintiff in the attachment proceedings.

The tenant asked the trial court to rule that:

"1. On all the evidence a verdict should be ordered for the tenant.

"2. The amendment to the writ in favor of Ellis, plaintiff, against Kavarik vacated the attachment.

"3. The name 'Kovarik' is not the same as the name 'Kavarik.'

"4. The records of attachments in the registry deeds were not sufficient in law to create an attachment on the property of Kovarik, and the tenant, Anderson, took title free from the attachment on which the levy and sale were based.

"5. The estate of Kovarik, if ever attached, was not under legal attachment on October 29, 1899, in favor of Ellis.

"6. The levy and sale on the execution were not sufficient in law to give title to the defendant as against the tenant.

"7. The title of the tenant is good as against anyone claiming under the alleged attachment of October 16, 1899, on the writ in favor of Ellis and under the judgment, levy, execution and sale put in evidence in this case.

"8. The amendment to the writ in the case of Ellis v. Kovarik was in the nature of the introduction of a new party.

"9. No notice of the amendment to the writ having been given to the tenant, he cannot be affected by it."

In response to this request, the judge found as follows: "I find that John Kovarik had actual notice of the service of the writ upon him, and that he admitted that he had received such service before the entry of the writ. I grant the tenant's third request for rulings with the addition of the words, 'but I find that both names were used by the plaintiff as intended for the same person.'

"I deny the other requests of the defendant."

The trial court found in favor of the defendant, but, at the request of the tenant, reported the case for the disposition of the supreme court.

J. R. Murphy, for the tenant.

G. L. Mayberry, for the defendant.

312 BARKER, J. The only ground which can be urged against the validity of the attachment at the first is the mistake in the name of the defendant. The defendant was in fact John Kovarik of Woburn. The misnomer may have been matter for abatement if John Kovarik saw fit to plead in abatement, but the writ was a writ against him. No statute provides that an attachment of real estate shall be ineffectual or void if the defendant is wrongly named in the writ, nor does

any statute or decision require in terms that the documents which show the attachment shall state the correct name of the defendant. The attachment cannot be ruled as matter of law not to have been an attachment of the estate of John Kovarik, because it described the property as that of John Kavarik of Woburn, it being shown that John Kavarik was not the name of any person, and that the mistake was not in any way fraudulent or an attempt to conceal the attachment.

The rule as to the description of the land necessary in an **313** attachment is that the description given in the return is sufficient if the same description would be sufficient to pass the land in a grant by the owner: *Taylor v. Mixer*, 11 Pick. 341, 350. Upon the evidence the judge could find that the description of the land in the return was sufficient and the attachment valid: See *Cleaveland v. Boston Five Cents Sav. Bank*, 129 Mass. 27. The description in the return which was before the court in *Williams v. Brackett*, 8 Mass. 240, was a correct description of a different parcel of land from that intended to be attached, and the defendant had an interest in each parcel of land, both that actually described in the return and that intended to be described.

On the other hand there is a plain distinction between this case and that of *Terry v. Sisson*, 125 Mass. 560, relied on by the tenant. There the attachment was of a deposit of the defendant's in a savings bank, and was by trustee process. That is a process devised to give the creditor the benefit of the property of his debtor which cannot be come at to be attached in the ordinary way: See *Prov. Stats.* 1758-59, c. 10; 4 *Prov. Laws*, State ed., 168; *Anc. Chart.* 614; *Stats.* 1794, c. 65. It is in a way governed by equitable considerations. In *Terry v. Sisson*, 125 Mass. 560, the alleged trustee owed the defendant a debt, and was justified in paying that debt upon request if in fact in ignorance of the attempted attachment, and if that ignorance was not the result of negligence or breach of duty on the part of the trustee. In the present case the tenant was a voluntary purchaser not acting under any obligation to Kovarik.

Instances are not rare in which the constructive notice provided for by statutes requiring the registration of instruments proves insufficient to protect the interests of those for whose benefit they are intended, but who do not for that reason have a right to priority: See *Sykes v. Keating*, 118 Mass. 517; *Gifford v. Rockett*, 121 Mass. 431; *Quimet v. Sirois*, 124 Mass. 162;

O'Connor v. Cavan, 126 Mass. 117; Gillespie v. Rogers, 146 Mass. 610, 16 N. E. 711.

The remaining question is whether the attachment was dissolved or made ineffectual as to the tenant by the amendment allowed without notice to him upon the entry of the writ on the suit of Ellis. This amendment did not change or enlarge the ³¹⁴ cause of action or introduce any new party, and the only effect of the omission to give the tenant notice of the motion to amend is that he was not precluded by its allowance from now contesting its effect: Diettrich v. Wolffsohn, 136 Mass. 335.

The tenant was not prejudiced by the amendment. Notwithstanding the misnomer Ellis, like the plaintiff in Cleaveland v. Boston Five Cents Sav. Bank, 129 Mass. 27, had the right to obtain a judgment and enforce the lien of his attachment, even without amending his writ if the defendant did not plead in abatement. Amendments to cure mere defects in form or clerical errors do not affect attachments: Ball v. Claflin, 5 Pick. 303, 16 Am. Dec. 407; Miller v. Clark, 8 Pick. 412; Haven v. Snow, 14 Pick. 28, 33, 34; Johnson v. Day, 17 Pick. 106, 109; Knight v. Door, 19 Pick. 48; Wight v. Hale, 2 Cush. 486, 493, 48 Am. Dec. 677; Warren v. Lord, 131 Mass. 560; Cain v. Rockwell, 132 Mass. 193. To dissolve the attachment or make it ineffectual as against a subsequent attaching creditor, purchaser or surety, the amendment must be such as to let in some new demand or cause of action: Haven v. Snow, 14 Pick. 28, 33, 34; Wight v. Hale, 2 Cush. 486, 493, 48 Am. Dec. 677; Cutter v. Richardson, 125 Mass. 72; Kellogg v. Kimball, 142 Mass. 124, 128, 7 N. E. 728; Doran v. Cohen, 147 Mass. 342, 7 N. E. 647; Dalton v. Barnard, 150 Mass. 473, 23 N. E. 218; Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593; Driscoll v. Holt, 170 Mass. 262, 49 N. E. 309.

As the attachment could upon the evidence properly be found to have been valid when made, and was so found, and as it was not dissolved or made ineffectual as to the tenant by the amendment, the rulings and refusals to rule excepted to by the tenant were not error.

Judgment for the demandant according to the finding.

In Attachment Proceedings the inherent power of a court to amend its process is the same as in other suits: Miller v. Zeigler, 44 W. Va. 484, 67 Am. St. Rep. 777, 29 S. E. 981. See, too, Wattles v. Wayne Circuit Judge, 117 Mich. 662, 72 Am. St. Rep. 590, 76 N. W. 115. Clerical defects in writs of attachment may be remedied by amendment. Thus a writ may be amended by correcting the

plaintiffs' name from "Wright and Brown" to "Wight and Brown," and as amended it has precedence over junior writs levied prior to the amendment. But it has been held that an attachment to enforce a lien for wages is lost by an amendment changing the Christian name of the plaintiff from "Edward" to "Edmund": See the monographic note to *Barber v. Swan*, 61 Am. Dec. 127. On the doctrine of *idem sonans*, see *State v. Williams*, 68 Ark. 241, 57 S. W. 792, 82 Am. St. Rep. 288, and cases cited in the cross-reference note thereto.

OLIVER DITSON COMPANY v. BATES.

[181 Mass. 455, 63 N. E. 908.]

ESTOPPEL.—One Who Leases a Piano to Another Having a Retail Store and Keeping Musical Instruments for Sale does not thereby give the lessee any authority to sell it, nor estop himself from recovering the piano from one who bought it from the lessee in good faith and for a valuable consideration in the belief that he owned it. (p. 425.)

Action of tort for the conversion of a piano. The defendant pleaded the general denial and that plaintiff was estopped. The instrument belonged to the plaintiff on July 9, 1895, when he leased it to J. Q. Beal & Son, retail dealers in musical instruments, from whom it was purchased by the defendant in good faith and without any notice of the plaintiff's title. The defendant objected to the admission of the lease in evidence unless it was first shown to have been brought to his notice, and on the ground that it tended to prove a private arrangement between the plaintiff and Beal & Son, but it was admitted in evidence. The defendant asked the court to instruct the jury as follows: "If the jury find that the defendant made its entire arrangements for the piano with the retail dealers, J. Q. Beal & Son, and that the plaintiff shipped or delivered the piano to the defendant upon an order coming from said Beal & Son, and that the plaintiff, when it should have spoken, kept silent, and gave no notice to the defendant that said Beal & Son were not authorized to contract with the defendant in relation to said property, and that while the plaintiff was thus silent the defendant purchased the piano from said Beal & Son, then the plaintiff is estopped from denying that the defendant acquired a good title to the piano and the verdict should be for the defendant." The judge refused to give the instructions asked for and submitted the question of damages to the jury, telling

them there was no evidence upon which they could find that Beal & Son were authorized to lease the piano, or that could be considered as estopping plaintiff from recovering. Verdict for the plaintiff, and the defendant alleged exceptions.

W. B. Grant, for the defendant.

C. L. Bremer, for the plaintiff.

⁴⁵⁶ MORTON, J. This is an action of tort for the conversion of a piano. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the admission of a written lease of the piano from the plaintiff to J. Q. Beal & Son, from whom the defendant afterward bought it, and to the refusal ⁴⁵⁷ of the presiding judge to give certain rulings that were asked for, and to certain instructions that were given by him.

1. The lease was clearly admissible, we think, to show the nature of the right of Beal & Son and to rebut any presumption of agency on their part.

2. The defendant contends that the question of the authority of Beal & Son to make the sale should have been left to the jury, and that the silence of the plaintiff and its delay in enforcing its rights constituted a fraud on the defendant, and estop it to assert any title to the piano. We see no ground on which either branch of the contention can stand. There was no evidence of any authority from the plaintiff to Beal & Son to sell the piano and the judge rightly so ruled and instructed the jury. They were merely lessees of the piano, and the fact that they had a retail store and kept musical instruments for sale, and that this was known to the plaintiff did not enlarge their authority or give them any right to sell the piano: *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545; *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368; *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470. Neither was there any evidence of estoppel for the jury to consider, and on this question also the ruling of the judge was right. The plaintiff was not bound to inform the defendant of the arrangement between it and Beal & Son, and it did not know, and had no reason to know or believe, that the defendant intended to purchase the piano of Beal & Son, or that Beal & Son intended to sell it. The defendant did not know of the existence of the lease, and therefore could not have been led in any way to make the purchase by the delay of the plaintiff in enforcing its rights or by its silence. The grounds of an estoppel are entirely wanting.

3. What we have said disposes of the first and second requests. In regard to the other two it is enough to say that neither was applicable to the case before the court, and both were rightly refused.

Exceptions overruled.

One Who Sells Goods with the knowledge that they are to be put on sale is estopped, as against an innocent purchaser, to claim that the sale was conditional and that the title had not passed: *Lewenberg v. Hayes*, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469; *Eisenberg v. Nichols*, 22 Wash. 70, 79 Am. St. Rep. 917, 60 Pac. 124. Compare *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. Rep. 627, 21 N. E. 160; *Triplett v. Mansur etc. Co.*, 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261. As to whether denominating the contract a lease alters this rule, see *Clark v. Hill*, 117 N. C. 11, 53 Am. St. Rep. 574, 23 S. E. 91; monographic note to *Andrews v. Colorado Sav. Bank*, 46 Am. St. Rep. 296. And as to sales by persons without title, in general, see the monographic note to *Velisian v. Lewis*, 3 Am. St. Rep. 195-206.

LEONARD v. LEONARD.

[181 Mass. 458, 63 N. E. 1068.]

HUSBAND AND WIFE—Conveyance for the Purpose of Depriving Her of Her Share in His Estate.—A conveyance of real property by a husband, reserving a life estate to the grantor, given in consideration of care bestowed and to be bestowed on him as long as he lives, but made chiefly for the purpose of depriving her of her statutory share of his estate, is valid and enforceable against her after his death, and will not be set aside in equity. (p. 428.)

HUSBAND AND WIFE—Gift Which Cannot be Enforced Against Her.—The taking of money out of a bank by a husband and depositing it in the name of a third person in the lifetime of the former, who lived for several years and drew no part of the money, may properly be regarded as illusory, where the object of the husband was to deprive his wife of her statutory rights in his estate. (p. 429.)

Bill in equity by the widow of George E. Leonard seeking to set aside a conveyance of real estate made by her late husband to James W. Leonard, his nephew, since deceased, and also to set aside a gift of personal property made to the defendant, who, when it was made, was the wife and is now the widow of James. The trial court granted all the relief prayed for, and the defendant appealed.

The plaintiff and her husband were married in 1851, but had no issue, and he died in November, 1894. In July, 1892, he

conveyed the premises in question to his nephew, reserving "the use, occupation, and control during the period of his natural life." After 1880 the relations between the plaintiff and her husband were unpleasant, and they did not live together, and the conveyance and gifts in question were chiefly made for the purpose of preventing her from retaining any share in his estate. The trial court declared both the conveyance to James W. Leonard and the gift to his wife void as against the plaintiff, and the defendant appealed.

F. H. Williams, for the defendant.

J. Everett, for the plaintiff.

⁴⁶⁰ HOLMES, C. J. This is a bill to set aside a conveyance of land and certain gifts of personal property on the ground that they were made by the plaintiff's husband for the purpose of defrauding her of the interest that she would have taken upon his subsequent death intestate and without issue: Pub. Stats., c. 124, sec. 3; Pub. Stats., c. 135, sec. 3. The master found that the principal purpose was as alleged, the other consideration of the deed being the care bestowed and to be bestowed upon the grantor as long as he lived, and that the conveyance and gifts were void as against the plaintiff, although the deed at least was made upon a consideration good against everyone else. We see no reason for revising his findings except as explained hereafter, and the only question which we shall discuss is whether the facts stated warrant the conclusion of law, or, in other words, whether this case is within the decision of *Brownell v. Briggs*, 173 Mass. 529, 54 N. E. 251.

In the form in which *Brownell v. Briggs* came before the court, it necessarily was assumed that the deed there passed upon was a serious instrument operating according to its tenor except so far as the demandant's rights prevented. Therefore, that decision does not stand upon the ground that the deed was understood by the parties to be an empty form got up to frighten the wife, although there was good reason to believe it, or that it was intended to be a testamentary instrument in disguise: See *Walker v. Walker*, 66 N. H. 390, 391, 395, 49 Am. St. Rep. 616, 31 Atl. 14. By the form of the deed the ⁴⁶¹ title passed to the tenant in the grantor's lifetime, so that it could not be said that the latter died seised: See *Hatcher v. Buford*, 60 Ark. 169, 174, 181, 29 S. W. 641. But it was not decided or implied, of course, that there was any right on the

part of the wife that the husband should hold all land that he owned at any time during marriage until his death, or any duty on the part of the husband not to sell or to give his land away in a transaction which was not aimed at the wife: *Lightfoot v. Colgin*, 5 Munf. 42; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Cameron v. Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759. As a husband can convey property notwithstanding his foresight of the effect of his conveyance upon his wife, the question arises to what extent his motive can make a difference. Ordinarily, except in cases under statutes or in determining the extent of a privilege to infringe upon the admitted right of another, motive does not affect the validity of a transaction in this commonwealth, and it does so even less in England. Cases are not in point where there is a right irrespective of the motive, such as that of creditors against conveyances manifestly defeating their power to collect their debts.

It is obvious that the decision in *Brownell v. Briggs*, 173 Mass. 529, 54 N. E. 251, must be read with an eye to the precise facts on which it arose. That case certainly was not intended to decide that any and every otherwise valid transaction was bad into which a jury should find that there entered the motive of dislike for the grantor's wife, or even every one in which dislike for his wife predominated over love for his neighbor or desire for gain: *Wood v. Bodwell*, 12 Pick. 268. In *Brownell v. Briggs*, 173 Mass. 529, 54 N. E. 251, the conveyance was a voluntary conveyance, unrecorded and left in the grantor's possession, which reserved to the grantor not only the right to use and occupy the land as he saw fit, but also the "power and authority to sell or convey the said premises in fee simple or in mortgage, and to dispose of the proceeds as I shall see fit." From the technical point of view such a conveyance does not quite take back all that it gives, but practically it does: *Welsh v. Woodbury*, 144 Mass. 542, 545, 11 N. E. 762. And the court decided that it was not enough to displace the right of the wife.

But in the case at bar no such power was reserved. The conveyance was an out and out conveyance of the fee subject to a life estate, and consideration was given for it in the support 462 of the grantor. Under such circumstances, apart from special statutes such as governed the decisions in *Littleton v. Littleton*, 1 Dev. & B. (18 N. C.) 327, 332, *Reynolds v. Vance*, 1 Heisk. 344, 345, and *Jiggitts v. Jiggitts*, 40 Miss. 718, the great weight of

authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed: *Holmes v. Holmes*, 3 Paige, 363; *Stewart v. Stewart*, 5 Conn. 317, 321; *Pringle v. Pringle*, 59 Pa. St. 281, 285; *Lines v. Lines*, 142 Pa. St. 119, 24 Am. St. Rep. 487, 21 Atl. 809; *Padfield v. Padfield*, 78 Ill. 16, 18; *Small v. Small*, 56 Kan. 1, 12, 16, 54 Am. St. Rep. 581, 42 Pac. 323; *Richards v. Richards*, 11 Humph. 429; *Smith v. Hines*, 10 Fla. 258, 286; *Hatcher v. Buford*, 60 Ark. 169, 180, 29 S. W. 641; *Williams v. Williams*, 40 Fed. 521, 522. See *Hays v. Henry*, 1 Md. Ch. 337, 340; *Dunnoek v. Dunnoek*, 3 Md. Ch. 140, 147. We are of opinion that the deed must be upheld.

With regard to the personal property, the finding of the master presumably was based upon the assumption manifestly made by him that the whole case was covered by *Brownell v. Briggs*, 173 Mass. 529, 54 N. E. 251. We see no sufficient reason why the transfer of nine hundred and seventy-five dollars to an account that read "Isabella S. Leonard in trust for Merton S. Leonard" should not stand. The form of the transfer corroborates the oral evidence, and makes it unlikely that the gift was a mere cover and that the donor retained control of the fund. As to the one thousand dollars standing in the name of the defendant the case is different. No portion of this was drawn in George E. Leonard's life, and, taking into account his motive and the unsatisfactory character of the evidence in support of the gift, we think it well may have been proved that this transfer was only illusory, and was not understood to be effectual between the parties.

Decree accordingly.

Transfers of Property by a Husband to defeat his wife's marital rights are fraudulent and void as to her: *Walker v. Walker*, 66 N. H. 390, 49 Am. St. Rep. 616, 31 Atl. 14; *Ward v. Ward*, 63 Ohio St. 125, 81 Am. St. Rep. 621, 57 N. E. 1095. But see *Jones v. Somerville*, 78 Miss. 269, 84 Am. St. Rep. 627, 28 South. 940. His bona fide transfers, however, are valid: *Smith v. Smith*, 24 Colo. 527, 65 Am. St. Rep. 251, 52 Pac. 790; *Smith v. Smith*, 22 Colo. 480, 55 Am. St. Rep. 142, 46 Pac. 128. See, also, *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992.

NASHUA SAVINGS BANK v. ABBOTT.

[181 Mass. 531, 63 N. E. 1058.]

STOCK EXCHANGE—Seat in as Property.—A seat in a stock exchange, which has a pecuniary value, may be transferred under restrictions, and upon the member's death can be transferred by a committee by sale, the price, after extinguishing all claims of other members, going to the legal representatives of the decedent, is property, and may be dealt with as such. (p. 433.)

A SEAT in a Stock Exchange may be Pledged, and as it is not susceptible of delivery, the instrument need not be recorded, and the lien can be enforced without foreclosure as of a mortgage of personalty. (p. 433.)

LIEN OF PLEDGEE—When does not Secure Subsequent Indebtedness.—An assignment of a seat in a stock exchange which declares that it shall remain in force until all indebtedness of the assignor to the assignee is paid, does not secure indebtedness subsequently contracted. (p. 433.)

PLEDGE OF SEAT in Stock Exchange—Lien of Extends to the Proceeds.—When a sale is made of a seat in a stock exchange by its officers, which is subject to a pledge, and the amount realized is paid to the administrator of the pledgor, this change of the property into money is like the conversion of mortgaged land into money by a foreclosure or sale, and the lien is transferred to the proceeds of the sale. (p. 434.)

STATUTE OF LIMITATIONS Against Administrators.—What is known as the short statute of limitations of Massachusetts, restricting the time in which creditors of a decedent must bring suit on claims against his estate, does not apply to a suit brought by a pledgee against an administrator to recover the proceeds of pledged property received by him. (p. 434.)

LACHES—Pledgee, When not Guilty of.—A delay of two years in suing an administrator to recover the proceeds of pledged property received by him with notice of the pledge does not constitute such laches as precludes the maintenance of an action, when it appears that the pledgee gave the administrator prompt notice of his debt and of his claim to a lien as security, and made an effort to prove his debt as a claim against the estate of the decedent. (p. 435.)

PLEDGE—When not Waived.—An unsuccessful attempt to prove as an unsecured claim a secured claim against the estate of a decedent does not, in the absence of any written waiver, extinguish the security, no one having been harmed by the attempt. (p. 436.)

ELECTION—Proceeding in Probate Court—When does not Bar Proceeding in Equity.—Resorting to the probate jurisdiction to prove a claim against the estate of a deceased person is not an election to choose the equity side of the same court to enforce the equitable ownership of money in the hands of the administrator of the estate against which the claim is offered. (p. 436.)

RELEASE OF SURETY does not Affect Principal.—If property is pledged to secure the payment of a promissory note executed by two makers, one of whom signs as surety for the other, the surety may be released with a reservation entitling the pledgee

to proceed against the maker, and such release will not preclude the pledgee from asserting his pledge against the proceeds of the pledged property in the hands of an administrator of the principal. (p. 436.)

Suit in equity commenced November 22, 1900, against the estate of Allen S. Weeks, deceased, to have the proceeds of a sale of a seat in the Boston Stock Exchange charged with an express trust or lien by reason of an assignment in writing made October 6, 1893, to secure payment of two promissory notes, one for five thousand dollars, signed by the decedent and Lucy N. Weeks, and the other for two thousand dollars, signed by him as maker and by Henry Sales as indorser. The assignment purported to transfer all the interest of the assignors in the membership and seat in the Boston Stock Exchange held by Allen S. Weeks, and declared that it should remain in full force until all the indebtedness of the assignee should be paid.

The constitution of the Boston Stock Exchange, among other things, provided as follows:

“Article X. Election to Membership. Section 1. The election of members shall be made by ballot, and no person shall be eligible who is not twenty-one years of age at the time of his application for admission. The applicant for admission must be proposed by at least two members of the Exchange to the governing committee, who shall report thereon before the day of election. The name of the candidate must be proposed at least ten days preceding the election, and fifteen black balls shall exclude. In the event of nonadmission, a new election for the same candidate shall not be held within thirty days of the last ballot, nor be acted upon until ten days from the date of the application.”

“Article XII. Transfer of Membership. Section 2. Whenever any member wishes to transfer his membership, the name of the party to whom he proposes to transfer shall be submitted to the governing committee, and his election shall be made by ballot as provided in article X.

“Section 3. In no case shall any transfer of membership be permitted until all dues to the stock exchange shall have been paid in full, said dues being hereby declared a prior lien upon the proceeds, to be satisfied in full before any distribution thereof shall be made.

“Section 4. When a member dies, the governing committee may dispose of his membership. From the proceeds they shall pay what they consider valid claims of the members of the ex-

change, and shall pay any balance to the legal representatives of the deceased."

"Section 6. All contracts, debts, or obligations of every description, with or to members of the exchange, of a member who agrees to transfer his membership, shall become due and payable when notice of said agreement to transfer is posted upon the bulletin of the exchange, and shall be liquidated and paid, as allowed by the governing committee, out of the proceeds of said membership, upon consummation of the transfer thereof. This law shall also apply in every case where a membership is transferred by the governing committee."

"Article XIV. Obligation to Abide by the Constitution. The constitution and by-laws of the exchange shall be recorded in a book to be provided therefor, and each and every member of the exchange, together with all who may at any time hereafter be admitted, shall sign the same, thereby pledging themselves to be governed by said constitution and by-laws, and by such other rules and regulations as may from time to time be adopted by the exchange."

"Article XVII. Gratuity Fund. Upon the death of any member of the exchange, there shall be levied and assessed against each surviving member the sum of twenty dollars (\$20), and the sum of three thousand dollars (\$3,000) shall be paid, as a gratuity to the representatives of the deceased, on the conditions as follows:

"First.—Should the member die leaving a widow and no children, the sum of three thousand dollars (\$3,000) shall be paid to such widow for her own use."

"Fourth.—Should the member die leaving neither widow or children, then the whole sum of three thousand dollars (\$3,000) shall be paid to such person or persons as he may especially designate, and in case of his decease without any special designation, it shall be paid to his heirs at law.

"Fifth.—Nothing herein contained shall ever be taken or construed as a joint liability of the exchange, or its members, for the payment of any sum whatever, beyond the pro rata assessment levied upon each member, as hereinbefore stated; it being distinctly understood that the amount is a gratuity."

The case was heard by Morton, J., who, at the request of the parties, reported it for the consideration of the full court.

A. S. Hall, for the plaintiff.

G. A. A. Pevey, E. B. Gibbs, and H. K. Brown, for the defendant.

535 BARKER, J. The right to a seat in the exchange had a pecuniary value, could be transferred under restrictions, and upon the member's death could be disposed of by a committee by sale, the price after extinguishing the claims of other members going to the legal representatives of the deceased. These characteristics make such rights property, and they are so recognized and dealt with: *Fish v. Fiske*, 154 Mass. 302, 28 N. E. 278; *Currier v. Studley*, 159 Mass. 17, 33 N. E. 709. See *Hyde v. Woods*, 94 U. S. 523; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *People v. Feitner*, 167 N. Y. 1, 82 Am. St. Rep. 698, 60 N. E. 265; *Barclay v. Smith*, 107 Ill. 319, 47 Am. Rep. 137.

The assignment of October 6, 1883, was in terms a pledge of this property to the plaintiff, and being upon a valuable consideration gave the plaintiff a lien. As the property was not susceptible of delivery the instrument need not be recorded (*Marsh v. Woodbury*, 1 Met. 436), and the lien could be enforced without a foreclosure as of a mortgage of personalty: *Taft v. Church*, 162 Mass. 527, 532, 39 N. E. 283; *McKie v. Gregory*, 175 Mass. 505, 56 N. E. 720. See, also, *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072.

We are of opinion that it was not intended to give the plaintiff a lien for all possible future indebtedness. We do not give that meaning to the words "This assignment . . . shall remain in full force until all indebtedness of said Allen S. Weeks to said bank shall have been paid." When delivered it was security for the payment of a loan of \$4,500 then made. On November **536** 1, 1894, this loan being unpaid and the assignment still in the possession of the plaintiff, a note of that date for \$5,000 was given in renewal of the \$4,500 loan and of another loan of \$500, and upon that note, which was a joint and several note of both of the makers of the assignment and signed by both, was this written statement: "Collateral Security. One membership (or seat) of the Boston Stock Exchange." The intention was to continue the lien for the payment of this \$5,000 note, and the writing was sufficient for that purpose.

The note of \$2,000 was dated May 31, 1890, and was in renewal of part of a note of \$2,300 dated December 1, 1884. Neither of these notes mentioned the assignment of October 6, 1883, and there is no writing signed by Weeks which makes it clear that the parties intended the lien to apply to either of these notes. We are of opinion that the \$2,000 never has been secured by the lien.

This lien for the debt represented by the \$5,000 note was in force on August 8, 1897, when the defendant's intestate died. Administration upon his estate was granted August 19, 1897. Thereafter the assignment was presented both to the officers of the exchange and to the defendant, and the claim was made that the plaintiff was entitled under it to be secured for its indebtedness. The seat was sold with notice of this claim and a large sum was paid over by the exchange to the defendant, who took it with like notice. This change of the property into money, in accordance with rights existing when the lien was created, was like the conversion of mortgaged land into money by a foreclosure sale and the lien subsisted and held the proceeds of the sale: *Western Union Tel. Co. v. Caldwell*, 141 Mass. 489, 492, 493, 6 N. E. 737.

As the defendant received the money with notice of the lien, and has of it in his hands more than enough to extinguish the debt for which the lien is security, the plaintiff is entitled to a decree unless the lien has been extinguished or the plaintiff's right to its enforcement lost since November 7, 1897, when the money was paid to the defendant.

One contention is that this suit is barred by the short statute of limitations. That statute applies to actions by a creditor of the deceased: Pub. Stats., c. 136, sec. 9; R. L., c. 141, sec. 9. The ⁵³⁷ right of the plaintiff to bring suit upon the note or to prove it as a debt of the defendant's intestate before the commissioners appointed when the defendant represented that estate insolvent is barred by the statutes cited. But the debt and the lien both exist, and this suit is not an action by a creditor to collect his debt, but a suit by an equitable owner to enforce his title. If the money had been received by the defendant's intestate, as in *Western Union Tel. Co. v. Caldwell*, 141 Mass. 489, 492, 493, 6 N. E. 737, the short statute of limitations would have applied. It was not so received, but was paid to the defendant after his appointment and with notice of the lien. By mingling with the funds of his intestate's estate money to which the plaintiff had an equitable title, and which the defendant took with notice of that title, the defendant could neither divest that title nor gain the right to a defense which protects him from the suits of creditors of his intestate. The statute does not protect an administrator in converting to the use of the estate of his intestate the property of another, and is no defense to him against an action to enforce the equitable ownership of another in property which the administrator has

received from as sale by the committee of the right of his intestate to a seat in the board, and which the administrator took charged with a lien and having notice of the lien: See Thayer v. Mann, 19 Pick. 535; Cunningham v. Davis, 175 Mass. 213, 221, 56 N. E. 2.

Nor has the plaintiff lost its right to enforce its lien by laches. The record shows that it gave prompt notice to the defendant both of its debt and of its claim of this lien as security. While no action was brought within the two years, during that period the plaintiff was insisting upon its debt. Upon the appointment of commissioners an effort was made to prove the debt before them, and thereafter the plaintiff attempted to collect it by a suit in equity. The only ground for contending that the plaintiff has been guilty of laches is the fact that in Powow River Nat. Bank v. Abbott, 179 Mass. 336, 60 N. E. 973, certain creditors who like the plaintiff, relying on the defendant's representations, did not sue him within two years have been adjudged to have been chargeable with culpable neglect within the meaning of Public Statutes, chapter 136, section 10. But although originally joined as a plaintiff in that suit, this plaintiff had ceased to be a party to it before ⁵³⁸ the judgment. Nor will the circumstances which bar a recovery under that statute necessarily support a plea of laches in other proceedings in equity, not brought by creditors of the estate as creditors, but brought like the present suit by an equitable owner of property to enforce his ownership. The question must, we think, be decided with reference to the usual rules governing the defense of laches, and this defense is not sustained.

There is a finding in the report that as to what took place before the commissioners the plaintiff had not waived its security. We are of opinion that the plaintiff has not lost or waived its right to enforce its lien either by what took place before the commissioners or by its course in joining in the bill in equity under Public Statutes, chapter 136, section 10, brought after the disallowance of its claims by the commissioners. Neither the defendant nor any creditor of the estate other than the plaintiff has been prejudiced by the action of the plaintiff in either of those matters. The whole claim of the plaintiff was disallowed, and it has neither received or been adjudged entitled to receive any payment out of the estate. The oral assent of the plaintiff to the defendant's statement to the commissioners that he considered the assignment ineffec-

tual and would not recognize it, and that the plaintiff had been so advised by the secretary of the exchange, was made in good faith and has harmed no one. An unsuccessful attempt to prove as unsecured a secured claim, in the absence of any written waiver, ought not to extinguish the security, no one having been harmed by the attempt.

The defendant's contention founded on the equity jurisdiction of the probate court is unsound. The probate and the equity jurisdiction of that court are distinct and its equity jurisdiction is a concurrent one only. Resorting to the probate jurisdiction to prove a claim against the estate of a deceased person is not an election to choose the equity side of the same court to enforce an equitable ownership to money in the hands of the administrator of the estate against which the claim is offered.

The remaining contention is founded upon the release of the joint makers of the note, and the plaintiff's assent to the disposition of the \$5,000 gratuity a part of which only was applied to the note. The gratuity, under the rules of the exchange was not a right, but merely a gift from the other members to the widow ⁵³⁹ of the deceased member. Whether or not the defendant could complain of the release of a comaker who was as to his intestate only a surety, if there had been no reservation in the release, there was such a reservation of the plaintiff's rights as against all others: *Sohier v. Loring*, 6 Cush. 537; *Kenworthy v. Sawyer*, 125 Mass. 28; *Beacon Trust Co. v. Robins*, 173 Mass. 261, 271, 53 N. E. 868.

Decree for plaintiff in the sum of \$4,654.26, with interest from January 23, 1899, and for costs.

A Seat in a Stock Exchange is, in a sense, property: *People v. Feetner*, 167 N. Y. 1, 82 Am. St. Rep. 698, 60 N. E. 265. However, it has been held not taxable: *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98, 36 Pac. 1034; nor subject to execution: *Lowenberg v. Greenbaum*, 99 Cal. 162, 37 Am. St. Rep. 42, 23 Pac. 794. Compare *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63, 29 Pac. 874.

**ANGLO-AMERICAN LAND, MORTGAGE AND AGENCY
COMPANY v. DYER.**

[181 Mass. 593, 64 N. E. 416.]

FOREIGN CORPORATIONS.—An Assessment Made by a Foreign Corporation, on shares not fully paid up, may be collected by it in the courts of this state of stockholders here residing. (p. 438.)

FOREIGN CORPORATIONS—Actions by to Recover Assessments.—The objection that the plaintiff's remedy to collect assessments on the stock of a foreign corporation is only by sale of such stock is removed by the fact that the defendant has impliedly or expressly agreed to pay any assessments which might be made. (p. 439.)

CORPORATIONS—Personal Liability for Assessments.—If the statutes under which a corporation was organized provide that the memorandum of association shall bind members to the same extent as if each had signed it, and that all moneys payable by any member in pursuance of the conditions and regulations of the company shall be deemed a debt due from him to it, and the articles declare that the directors may, from time to time, make such calls as they think fit, upon members, in respect to moneys unpaid on their shares, and that each shall pay the amount of the call so made on him to the persons and at the times and places appointed by the directors, each member must be regarded as having personally promised to pay such calls, and an action therefor may hence be sustained against him. (p. 439.)

CORPORATION—Waiver of Stockholder's Right to Object Before Paying Assessments that all the Stock has not been Subscribed for.—If the memorandum of association of a corporation, while providing the whole amount of its capital stock, declares that the first issue shall be a lesser amount, a stockholder receiving part of such lesser issue waives the right to object, in an action to recover assessments, that all the stock has not been subscribed for. (p. 440.)

CORPORATIONS—Calls for Unpaid Assessments—Reasons for Need not be Shown.—The defendant, in an action to recover assessments on stock owned by him and not fully paid up cannot successfully defend on the ground that no necessity therefor is shown. The necessity or wisdom of the assessment, when it is within the power of the directors to make it, cannot be controverted by the stockholders, at least in the absence of fraud. (p. 440.)

COMPROMISE—Waiver of Right to Insist upon.—If a stockholder in a corporation makes an agreement with its attorneys to compromise its claim for unpaid subscriptions to its stock, and pays in pursuance of such compromise, but on being informed that the agents of the corporation had been advised that the compromise was ultra vires and void, and that the amount received would be returned, accepts payment of such amount, though declaring that he did not wish it returned, such acceptance and the retention of the moneys amount to a waiver of his right to insist upon the compromise. (p. 441.)

EVIDENCE.—Statutes of a Foreign Country may be proved by a copy, proved to be a true copy by a witness who has examined and compared it with the original. (p. 441.)

R. A. Hopkins and H. P. Harriman, for the defendant.

O. Powell, for the plaintiff.

594 MORTON, J. This is an action to recover certain assessments made upon forty shares of the capital stock of the plaintiff company held by the defendant. The shares are of the par value of ten pounds each, and the liability of the shareholders is limited to the par value. The assessments in suit amount to six pounds per share, and assessments amounting to two pounds per share had been previously paid by the defendant—one pound when he bought the stock in 1884 and one pound on an assessment made in 1885. The exceptions set out all the material evidence. At the close of the evidence, the defendant requested certain rulings, all of which except two were refused, and the jury were directed to return a verdict for the plaintiff. The case is here on exceptions by the defendant to **595** the ruling thus given, and to the refusal to rule as requested, and on exceptions to the refusal to make certain rulings that were requested during the trial. We shall consider only the exceptions that have been argued by the defendant, treating the others as waived.

Amongst the rulings requested and refused was one that on all the evidence the action could not be maintained and that a verdict be directed for the defendant. The plaintiff is a corporation organized under the companies' acts of Great Britain. The first question, and what is said on the defendant's brief to be the principal question, is whether assessments made by foreign corporations can be collected by such corporations in the courts of this commonwealth of stockholders residing here. If the other grounds of liability are present, we see no objection to the maintenance of such an action against resident stockholders in the fact that the corporation seeking to collect the assessments is a foreign corporation. The liabilities of resident stockholders in foreign corporations have been recognized and enforced in numerous cases in the courts of this commonwealth. It is unnecessary to do more than refer to the recent case of Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, where the authorities are collected and considered and where it was held that an assessment upon the defendant as a stockholder in a bank in the state of Washington could be collected here. The

objection that the remedy is by a sale of the stock as has been held in regard to local assessments in various cases in this state (New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 354, 7 N. E. 773, and cases cited) is removed by the fact that the defendant has, if not expressly, at least impliedly, agreed to pay to the plaintiff any assessments that might be made. In his application for the stock, which was in writing, he agreed to accept the shares that might be allotted to him "upon the terms of the prospectus and memorandum and articles of association," and authorized the insertion of his name upon the memorandum of association. The statute under which the corporation was organized, and which must be taken to be a part of the contract between the defendant and the plaintiff (Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888; Hutchins v. New England Coal Min. Co., 4 Allen, 580), provides that the memorandum of association shall bind the members of the company ⁵⁹⁶ "to the same extent as it would" if each member had subscribed his name and affixed his seal thereto, and there were contained in it a covenant on his part and his heirs, executors and administrators to observe all the conditions of such memorandum. The statute makes similar provisions in regard to the articles of association, and further provides that "all moneys payable by any member of the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company." The articles of association also provide that "the directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made on him to the persons, and at the times and places appointed by the directors." The certificate that was issued to the defendant provided that he took the shares "subject to the articles of association and the rules and regulations of the company." The effect of these various provisions was, we think, to create a valid and binding contract between the defendant and the plaintiff company by which he became bound to pay to it such calls or assessments as the directors might make upon him from time to time in respect to the moneys unpaid on his shares, and which could be enforced against him in the courts of this state or of any other state or country where proper service could be obtained upon and jurisdiction acquired over him.

The defendant further objects that the capital stock had not

all been subscribed for when the assessments were made, and that therefore, under *Katama Land Co. v. Jernegan*, 126 Mass. 155, and other cases decided in this commonwealth, the action cannot be maintained. The memorandum of association provides that "the nominal capital of the company is five hundred thousand pounds, divided into fifty thousand shares of ten pounds each, of which the first issue shall be twenty-five thousand shares, with power to increase such capital, and to issue all or any part of the original or increased capital at a premium or at a discount," etc. Upward of thirty-seven thousand shares have been issued. The provision quoted above formed a part of the contract between the defendant and the plaintiff company, and by agreeing that the first issue should be twenty-five thousand ⁵⁹⁷ shares, with power to increase the capital, the defendant has waived the right, if he would otherwise have had it, upon which we express no opinion, to object that the whole fifty thousand shares had not been subscribed for. There is nothing contrary to public policy in such an agreement. If the provision that the first issue should be twenty-five thousand shares be regarded as a stipulation that that number of shares must be subscribed for, then it appears that the stipulation has been complied with. It is not necessary to consider whether it should be so regarded, or what would be the effect under the English law, which is the law that must govern this case of assessments made before the stipulated capital had been subscribed: See *Ornamental Pyrographic Woodwork Co. v. Brown*, 2 Hurl. & C. 63; *Lind. Comp.*, 5th ed., 410.

The defendant further objects that there is nothing to show for what purpose the calls or assessments were made, or that any necessity existed for them in the condition of the company. These are matters which are not open to inquiry here. The necessity or wisdom of an assessment, where it is within the power of the directors to make it, as it was here, cannot be controverted, at least in the absence of fraud, by the stockholders: *Oglesby v. Attrill*, 105 U. S. 605; 2 *Thompson's Law of Corporations*, sec. 1710; *Cook on Stock and Stockholders*, sec. 113.

The defendant further contends that a valid and binding agreement of compromise had been entered into between him and the plaintiff company before the bringing of this suit in respect to the assessments sued for. The effect of his contention is, and must be, though it is not so stated, that such agreement operates as a bar to the maintenance of this action. It appears that the attorneys of the plaintiff company made an

offer of compromise which was accepted by the defendant for himself and others. The agreement was in substance that the defendant and those joining in it should be released from further liability for the assessments upon payment of one of the assessments, which was specified, with interest, and the payment of such further sums as on investigation should appear to be their proportion of the amount necessary to pay off the indebtedness of the company. The defendant paid to the attorneys the amount of the assessment agreed on and interest. The only ⁵⁹⁸ authority which the attorneys had to make the offer arose out of their employment as attorneys. Afterward the board of directors was advised that the proposed compromise would be ultra vires as to creditors of the company, and was impracticable, and the defendant was so informed, and was asked whether the money that he had paid should be returned to him, or whether it should be returned and applied by the company toward the payment of the assessments that were due. In consequence of a letter received from him the money which he had paid for himself and others was returned to him. In acknowledging the receipt of the money he wrote that he did not wish what he had himself paid returned, as he was undetermined what to do, and that he held the money subject to the order of the plaintiff company. But he kept the money and nothing more has been done under the attempted compromise.

Whether an attorney at law has authority by virtue of his employment as such to agree, without his client's sanction, to a compromise of his client's suit out of court may be regarded as still an open question in this commonwealth, though it is said that the weight of authority in this country seems to be against such an authority: *New York etc. R. R. Co. v. Martin*, 158 Mass. 313, 33 N. E. 578; *Dalton v. West End St. Ry.*, 159 Mass. 221, 38 Am. St. Rep. 410, 34 N. E. 261; *Lewis v. Gamage*, 1 Pick. 346. We do not find it necessary to consider or decide the question in this case. The attempted compromise was at the most an accord without satisfaction: *New York etc. R. R. Co. v. Martin*, 158 Mass. 313, 315, 33 N. E. 578; *Herrmann v. Orcutt*, 152 Mass. 405, 25 N. E. 735. The defendant accepted the return of the money which he had paid, though attempting to qualify his action, and is bound thereby. It is clear, also, that, as to creditors at least, the proposed compromise was ultra vires: *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Spackman v. Evans*, L. R. 3 H. L.

271. Whether such a contract would be valid between the corporation and its stockholders if duly entered into and executed we need not consider: *Sawyer v. Hoag*, 17 Wall. 610, 619.

The statutes of Great Britain were proved in the manner provided by Public Statutes, chapter 169, section 73: See *Frith v. Sprague*, 14 Mass. 455. It was not necessary that the copies should be authenticated. "A copy proved to be a true copy, by a witness who has ⁵⁹⁹ examined and compared it with the original," is admissible: 1 Greenleaf on Evidence, sec. 488.

Certain other objections have been urged by the defendant, such as that a retiring allowance was made by the directors to one Bennett, that one of the sections in the articles of association referred to "the scheme of arrangement of 1895," and that another section provided that the directors might exercise all the power conferred by "the companies' seals act, 1864," and that there was no evidence of what the scheme of arrangement of 1895 was, or what the powers conferred by "the companies' seals act" were. Neither of these objections seems to us to relate to matters that are shown to be material. It is also objected that the certificate of the registrar of joint stock companies that the plaintiff "was incorporated under the companies' acts, 1862 to 1880, as a limited company, on the thirty-first day of October, one thousand eight hundred and eighty-two" should have been excluded because not under the seal of that officer, and because there was no evidence that he had not an official seal. It would seem that if the defendant objected to the certificate because it was not under seal, it was for him to show that there was an official seal. But we do not think that the defendant was harmed or could have been harmed by the admission of the certificate. It sufficiently appeared from other evidence in the case that the plaintiff was a corporation.

We have considered the objections that have been argued by the defendant and the result is that we think that the exceptions should be overruled.

So ordered.

The Liability of a Stockholder to pay calls upon his subscription for stock may be enforced in another state or country, but not in contravention of the policy of its laws or in violence to the rights of its citizens: *Mandel v. Swan Land etc. Co.*, 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. 462; *Bank of China etc. v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676, 61 N. E. 774. The necessity of a call is not open to question by the stockholders, but must be determined by the directors themselves: *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

LONG v. PRUYN.

[128 Mich. 57, 87 N. W. 88.]

NURSERYMAN—Liability of for Furnishing Inferior Trees.—If a nurseryman sells trees which he represents will bear a large, white, bright peach, good sellers, he is liable, though he furnishes trees of the species named, but which bear inferior and worthless peaches. (p. 444.)

NURSERYMAN—Liability for Furnishing an Inferior Variety of Trees.—Under a contract to sell, which permits the vendor, if he has not the trees ordered, to substitute others of equally good variety, he is liable if he substitutes trees of an inferior variety. (p. 444.)

EVIDENCE.—Judicial Notice cannot be taken that sowing oats or planting corn in a young orchard is not good care or husbandry, nor that good care will make poor varieties of trees bear good fruit. (p. 444.)

EVIDENCE of the Value of Land.—The fact that a witness does not know of any sales of fruit lands does not render him incompetent to testify to their value. (p. 445.)

THE MEASURE OF DAMAGES to which a Nurseryman is Liable where he sells trees of one variety, and delivers another, is the value which would have been added to the premises of the purchaser if the trees had been of the variety ordered. (p. 445.)

EVIDENCE of the Value of Land—What Sufficient.—Where there is some testimony showing the opinion of a witness of the value of land as to how much it would have been enhanced by the addition of trees of a variety ordered of the defendant, and of what such trees would, ordinarily, produce, there is sufficient evidence to enable the jury to determine how much the value of the land would have been augmented had trees been furnished of the varieties ordered. (p. 445.)

DAMAGES for not Furnishing Fruit Trees as Sold.—If it appears that had trees been furnished of the varieties sold they, or some of them, would probably have been killed by the cold weather, an instruction to the jury that this may be considered as bearing upon the value which the trees would have been to the premises if furnished as ordered is sufficiently favorable to the defendant. (p. 445.)

Assumpsit for breach of warranty in the sale of fruit trees. Judgment for the plaintiff and the defendant brought error.

Crane, Norris & Drew, for the appellant.

McKnight & McAllister, for the appellee.

58 HOOKER, J. The plaintiff, a farmer, bought peach and apple trees from the defendant, and set them upon his farm. This action is brought to recover damages arising from the delivery of trees of different variety and inferior quality to those contracted for. From a verdict of nine hundred and seventy-five dollars in favor of the plaintiff, the defendant has appealed.

Among the trees contracted for were twenty-five Fox Seedlings and fifty Canada Reds. The testimony showed that the former were represented to "bear a large white, bright peach, good sellers," but that, although Fox Seedlings were delivered, they did not bear such, but bore an inferior and worthless peach. As to the Canada Reds, it showed that trees labeled "Smith Cider" were substituted under a clause in the contract permitting other trees of equally good variety to be substituted where trees ordered could not be furnished, and that the fruit borne by these was inferior and worthless. It is claimed by appellant's counsel that the declaration does not contain allegations justifying this proof; but we find in the declaration the allegations that it was represented that the Fox Seedlings would "bear a large white, bright peach, good sellers," and that "in place of the twenty-five Fox Seedling trees, standard, defendant delivered Fox Seedling trees of a poor variety," **59** and "that all of said trees were inferior and worthless varieties, and absolutely of no value," etc. It was proper to prove these allegations, and the evidence fairly tended to do so. The proof of a substitution of an inferior quality for Canada Reds, and their acceptance under misrepresentation, showed a breach of the promise to furnish "Canada Reds or an equally good variety."

There is no occasion to discuss the proof tending to show care in the setting and attending said trees. There is sufficient proof upon the subject to make it a question for the jury. We cannot take judicial notice that sowing oats or planting corn in the same field was not good care, nor can we decide how far, if at all, proper care would make poor varieties bear good fruit.

Counsel make a wholesale assignment of error in the "ad-

mission of the testimony of each and every witness as to the value of the land, inasmuch as they did not show that they were qualified to express an opinion of the value of lands." We think the testimony was admissible, under the authorities cited in plaintiff's brief, although witnesses testified that they knew of no sale of fruit lands: *Stone v. Covell*, 29 Mich. 359; *Carter v. Carter*, 36 Mich. 207; *Enright v. Hartsig*, 46 Mich. 469, 9 N. W. 496; *City of Detroit v. Robinson*, 93 Mich. 428, 53 N. W. 564; *Heilman v. Pruyn*, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97; *Angell v. Pruyn*, 126 Mich. 16, 85 N. W. 258.

In the case of *Heilman v. Pruyn*, 122 Mich. 302, 80 Am. St. Rep. 570, 81 N. W. 97, the court instructed the jury that "the measure of damages was the value that would have been added to the premises if the trees had been of the varieties ordered." This was sustained as a correct rule by this court, and it is the rule laid down by the learned circuit judge in the case now before us.

It is said that there was no evidence to enable the jury to find the value of the land. There was testimony of some witnesses as to their opinion of the value of the land, and how much it would be enhanced by the addition of such trees. Some estimated by the tree; others, by the ⁶⁰ acre. There was also testimony as to what such trees would ordinarily produce. All could be made use of by the jury to perform their function of determining the added value. It is said that the witnesses were asked to state the value of the trees; but the record shows that they were asked and gave the added value at so much per tree, and we do not find the testimony complained of.

Testimony was offered to show that, after these trees came into bearing, a hard winter killed many of them, and it is claimed that the same fate would have befallen them had they been good varieties, and that the fact was important by way of mitigation of damages. No exception appears to have been taken to the ruling. The same question arises upon the charge. The charge was as favorable to the appellant as it should have been under the testimony: See *Heilman v. Pruyn*, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97; *Angell v. Pruyn*, 126 Mich. 16, 85 N. W. 258.

Some minor points are raised relating to the cross-examination of the defendant, which we think do not call for elaboration.

We find no error, and the judgment is affirmed.

The other justices concurred.

The Measure of Damages for a breach of warranty as to the kind of trees sold by a nurseryman is the difference between the value of the land occupied by the trees set out on it when the breach of warranty is discovered, and the value the same land would have had, at the same time, if the trees ordered had been planted instead of the kind sold: Shearer v. Park Nursery Co., 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412. See, too, Heilman v. Pruyn, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97; Reiger v. Worth, 127 N. C. 230, 80 Am. St. Rep. 798, 37 S. E. 217.

CITY OF GRAND HAVEN v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

[128 Mich. 106, 87 N. W. 104.]

PUBLIC OFFICE—Term of.—The period between the election of a successor, and the time he actually qualifies, is as much a part of the prior term as the preceding period, and this, too, where a party is elected his own successor. (p. 447.)

OFFICIAL BONDS—When Continue after the Expiration of a Term.—If a law provides that an officer shall hold for a designated time and until his successor is elected and qualifies, the sureties on his official bond remain liable until his successor qualifies. (p. 448.)

OFFICIAL BONDS—Sureties on—When Become Liable.—The sureties on an official bond are liable only for moneys received by their principal after its approval. Antedating it does not make it binding for a period preceding its delivery, if its language is not retrospective. (p. 449.)

Assumpsit upon official bond. Judgment for the plaintiff, and the defendant brings error.

Bundy & Travis, for the appellant.

Walter I. Lillie, city attorney, for the appellee.

106 LONG, J. This action is on the official bond, for the second term, of John Cook, city treasurer of the city of Grand Haven, which is incorporated under the general **107** law of this state as a city of the fourth class. The case was referred under the statute, and comes up on the exceptions to the referees' conclusions of law, which exceptions were overruled by the court below.

It appears that Cook was elected city treasurer of the city of Grand Haven at the charter election held in April, 1898.

He qualified, giving bond with individual sureties, and entered upon the discharge of his duties, May 23, 1898. At the next annual election, held in April, 1899, he was re-elected, and qualified on the eighteenth day of May, 1899, when the bond in suit was filed, and accepted by the common council. The penalty of the bond is twenty-five thousand dollars, with the defendant here as surety, which executed it at the city of Baltimore, Maryland, on May 11, 1899. Prior to the eighteenth day of May, 1899, Cook had abstracted from the city funds the sum of seventeen hundred and six dollars and thirty-five cents, and was at that time a defaulter to that amount—a fact which was not known then to anyone except himself. After that date he abstracted and converted to his own use from the city funds the further sum of seven hundred and twenty-seven dollars and eighty-four cents. It is the claim of defendant that it is liable on the bond in suit for the latter amount only, while the plaintiff claims that it is liable for the full amount of the shortage, two thousand four hundred and seventy-six dollars and ten cents, and for which amount judgment was rendered by the circuit court.

The bond in suit covers the period of time from May 18, 1899, the date on which it was filed and accepted by the common council, and does not relate back to April 10, 1899, as claimed by plaintiff. Grand Haven is a city of the fourth class, organized under chapter 88, 1 Compiled Laws, in which section 2993 provides: "The mayor, city clerk, city treasurer, supervisors, and constables shall hold their offices for the term of one year from the second Monday in April of the year when elected, and until their successors are qualified and enter upon the duties of their offices."

Mr. Cook had not qualified until his bond was accepted by the common council, and he could not enter upon the duties of his second term of office until then. Up to that ¹⁰⁸ time he was holding office by virtue of his first election. It is settled by numerous authorities under statutes similar to ours that the period between the election of a successor and the time he actually qualifies is as much a part of the prior term as the preceding period, and that, too, where a party is elected his own successor: *Commonwealth v. Hanley*, 9 Pa. St. 515; *Butler v. State*, 20 Ind. 173; *People v. Whitman*, 10 Cal. 45; *State v. Berg*, 50 Ind. 500; *Lynn v. Mayor etc. of Cumberland*, 77 Md. 453, 26 Atl. 1002; *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208, 29 N. E. 773. It is also settled that where the

statute or the constitution provides that an officer shall hold his office for a stated period, "and until his successor is elected and qualified," the sureties on his bond continue liable for his official acts after the expiration of the stated period, and until the election and qualification of his successor. It was expressly held in *State v. Kurtzeborn*, 78 Mo. 98, that where by statute a constable's term of office is two years, and until his successor is elected and qualified, the liability of the sureties on his bond will continue after the expiration of the two years, and until his successor is elected and qualified. This rule was expressly laid down in *Township of Paw Paw v. Eggleston*, 25 Mich. 36; *City of Detroit v. Weber*, 29 Mich. 24. See, also, *County of Placer v. Dickerson*, 45 Cal. 12; *Wheeling v. Black*, 25 W. Va. 266; *State v. Wells*, 8 Nev. 108; *Thompson v. State*, 37 Miss. 518.

We think counsel are correct in saying that the bond in the present case does not relate back to the tenth day of April. The language of the bond is not retrospective. The condition is that if "John Cook shall well and faithfully perform all the duties of said office of treasurer of the city of Grand Haven for and during the term for which he was elected, and shall account for and pay over all sums of money that shall come to his hands as such treasurer," etc. His second term did not commence until May 18th, and the surety on that bond would be liable only for moneys coming into his hands after his bond was approved.

¹⁰⁹ In *Hyatt v. Sewing-Machine Co.*, 41 Mich. 225, 1 N. W. 1037, this court held that an antedated bond does not bind the sureties for the period preceding the date of its delivery if its language is not retrospective. The bond in that case was given for the good conduct of one Tuttle, as agent of the company. It was said by the court: "The agreement between Tuttle and the company, together with the bond, were dated, respectively, July 11, 1871, and those parties appear to have regarded the agreement as taking effect at that time. It seems that Tuttle was already acting in the same way under a prior agreement and obligation. The present bond was not executed and delivered until August 23, 1871—several weeks after the date expressed. During the intervening period it was not in existence, and plaintiff in error was not then answerable for anything transacted. The circuit judge ruled that after its delivery the bond operated retrospectively to the date, and bound the plaintiff in error from that time, and he allowed recovery

for transactions perfected in that interval. . . . The question turns on the construction of the obligation, and it must be held to speak from the time it took effect. No other view is admissible now. It is not to be assumed that the surety intended to become responsible for acts or delinquencies accomplished before he bound himself: *Myers v. United States*, 1 McLean, 493, Fed. Cas. No. 9996. On the other hand, it is just to suppose that, if the parties had understood that past transactions were to be covered, 'the bond would have been made retrospective in its language': *Farrar v. United States*, 5 Pet. 373; *United States v. Boyd*, 15 Pet. 187. Such, however, is not the case. The terms are all future. The language imports an undertaking relative to posterior transactions only, and it cannot be applied to antecedent ones without violating its natural sense. We are therefore of opinion the court erred in applying the bond to matters which arose before it was given: See, also, *United States v. Le Baron*, 19 How. 73; *Bruce v. State*, 11 Gill & J. 382.

It is apparent, therefore, that the defendant can be held liable only for the sum appropriated by Cook to his own use after the time of acceptance by the council of the bond in suit, which is the sum of seven hundred and twenty-seven dollars and eighty-four cents. The judgment ¹¹⁰ of the court below must be reversed, and judgment entered here for seven hundred and twenty-seven dollars and eighty-four cents and interest in favor of plaintiff. The defendant will recover costs of this court, and plaintiff will recover costs of the lower court.

The other justices concurred.

Acts for Which Sureties on an Official Bond are liable are considered in the monographic note to Feller v. Gates, 91 Am. St. Rep. 500-579. And when an official bond becomes binding on the sureties, and what irregularities release them from liability, are considered in the monographic note to Estate of Ramsay v. People, 90 Am. St. Rep. 188-206. Sureties are not answerable for defaults occurring before the execution and delivery of the bond: State v. Finn, 98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994; People v. Van Ness, 79 Cal. 85, 12 Am. St. Rep. 134, 21 Pac. 554. On the other hand, the liability will not terminate immediately upon the expiration of the official term, but if no officer qualifies within a reasonable time, they will be exonerated from further liability, although their principal may, in fact, continue in the discharge of the duties of the office: See the monographic note to Crown v. Commonwealth, 10 Am. St. Rep. 857. Consult, also, O'Brien v. Murphy, 175 Mass. 253, 78 Am. St. Rep. 487, 56 N. E. 283.

BOARD OF SUPERVISORS OF KENT COUNTY v. VERKERKE.

[128 Mich. 202, 87 N. W. 217.]

PUBLIC OFFICERS—Money in Possession of—Title to, in Whom Vested.—The title to moneys coming into the hands of a county officer does not vest in him; they remain public moneys. (p. 451.)

PUBLIC OFFICERS—Liability of to Account for Interest Received on Public Moneys.—If a county treasurer deposits public moneys with a bank, and receives interest thereon, he must account therefor to the county, though the deposit was not authorized by law. (p. 451.)

Mandamus to compel John A. Verkerke to pay over certain moneys to his successor in the office of county treasurer. The writ was denied, and the relator brought certiorari.

Ward & Brown, for the relator.

Frank A. Rodgers, for the respondent.

202 HOOKER, J. The respondent held the office of county treasurer for the county of Kent from November 5, 1900, to January 1, 1901. During that time he deposited with a bank in Grand Rapids a sum of money, consisting of the following funds: Delinquent tax money belonging to **203** the state, \$2,296.54; liquor tax money belonging to the city of Grand Rapids, \$2,096.66; delinquent school money belonging to the city of Grand Rapids, \$5,000; primary school interest money belonging to the townships in Kent county, \$20,000—amounting in all to the sum of \$29,393.20. He received from the bank two per cent interest on this sum, amounting to \$55.44, and did not account for or pay the same to his successor. The board of supervisors instituted this proceeding to compel such payment, and the relator has brought certiorari, the writ of mandamus having been denied by the circuit court.

The respondent maintains that the title to public moneys coming to his hands on behalf of the state and city vested in him, and that the relation was that of debtor and creditor; that the law does not require him to deposit the funds, or contemplate the payment of interest; and that all that is required of him by law is that he account and pay over the amounts of taxes collected, to do which he is personally bound

by law and by his bond. It is strenuously insisted that "a public officer is not liable for interest or profits made by him from public funds, in the absence of a statute charging him therewith, when his liability for such funds is absolute."

These funds came into the hands of the county treasurer by virtue of his office. He held them officially, and whatever may have been his title to such funds under the law passed upon in the case of *Perley v. County of Muskegon*, 32 Mich. 132, 20 Am. Rep. 637, they are certainly public moneys under section 1197 of the Compiled Laws, which took effect three months after the *Perley* case was heard in this court. Not only does section 1197 definitely establish the rule that such funds are public moneys, and therefore cannot belong to the custodian, but section 1198 requires him to keep them separate and apart from his own money, while section 1199 prohibits use by him for a private purpose under any pretext, and forbids the loan of such funds. Section 1200 provides that, where such funds are authorized to be deposited in a bank, the interest ²⁰⁴ accruing shall belong to and constitute a general fund of the state, county, or other public or municipal corporation, as the case may be. Under this section, it is clear that, if such money was lawfully deposited, the interest does not belong to the respondent. His counsel seems to recognize this, but contends that the law did not authorize such deposit, and consequently that the county is not entitled to the interest. If this is true, the earnings from any unlawful and prohibited use of the money could be held by the county treasurer, notwithstanding the fact that section 1200 contemplates that earnings of such funds shall belong to the public. We think public policy should preclude the treasurer from asserting his want of authority to make the deposit. But, aside from this, the general rule that gives the cestui que trust the earnings of a trust fund is a sufficient reason for holding that the municipality, and not the treasurer, is entitled to this interest.

It is urged that the county is not entitled to this interest in any event, and therefore the board of supervisors have no right to this writ. We think section 1200 settles that question by providing that it shall constitute a general fund for the municipality represented by the officer.

The order is reversed, and the writ will issue as prayed, with costs of both courts.

The other justices concurred.

State and County Treasurers are simply custodians of public moneys coming into their hands by virtue of their offices, and such funds at all times remain public moneys while in their official possession, or in the hands of their depositaries: *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 926. And where a city treasurer becomes a borrower of the funds in his official custody, and pays interest to himself as such officer, his sureties are answerable for such interest if he misappropriates it, or it is by any other cause lost or not properly accounted for: *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177, 50 Am. St. Rep. 795, 33 Atl. 269.

H. M. TYLER LUMBER COMPANY v. CHARLTON.

[128 Mich. 299, 87 N. W. 268.]

SALE—When Does not Vest Title.—A written order to sell two certain lots of lumber at one price for the merchantable and another for the mill culls, shipment of one to be made by July 25th, and the other by August 20th, and the lumber to be inspected by a person named, which offer was accepted in writing, and afterward an agent of the purchaser made a count of the piles of lumber and checked it off on a memorandum, no one being placed in charge, nor the dock owner notified of the change in ownership, nor any change being made in the insurance, and it being understood that when shipped the lumber was to be put over the rail of the vessel by the seller, does not vest title in the purchaser, there being no payment made except for one shipment which was taken, and no means of knowing how much of the lumber there was, nor how much of each quality until the inspection was made. (p. 460.)

Replevin to recover lumber. The court directed a verdict in favor of the plaintiff, on which the judgment was entered, and the defendants brought error.

Alexander J. Groesbeck and Watts S. Humphrey, for the appellants.

C. S. Reilley and Frost & Sprague, for the appellee.

300 MOORE, J. This is an action of replevin. There is almost no dispute about the facts. The firm of J. & T. Charlton were the owners of logs which were manufactured into lumber by the Cheboygan Lumber Company in the city of Cheboygan in the spring of 1899. This lumber was piled on the docks of the Cheboygan Lumber Company. It was known as "Lots 6 and 7 O. K. stock." Lot 6 was piled in its own piles, separate from lot 7, and separate from all other lumber; and so lot 7 was piled separate from lot 6, and separate from all other lumber. There were scattered among these piles other

piles of lumber, but no other lumber was ever put in a pile of lot 6 or lot 7. The lumber was all marked. Lot 6 was plainly and distinctly marked, "Lot 6 O. K.," and in addition the initials of its manufacturers, "J. & T. C." Lot 7 was similarly marked. These marks were placed on the lumber at the time of the piling. They were put on with lampblack. The sawing of lot 6 was finished on May 22d, of lot 7 on June 12, 1899. Mr. Rogers had charge of the lumber for the Charltons.

On July 17, 1899, Mr. Thomas Charlton handed the plaintiff the following proposition:

"North Tonawanda, N. Y., July 17, 1899.

"The H. M. Tyler Lumber Company, North Tonawanda, N. Y.

"Gentlemen: We agree to sell you the lumber now piled on docks of Cheboygan Lumber Company at Cheboygan, ³⁰¹ Mich., known as 'Lots 6 and 7 of the O. K. stock,' containing, according to estimate, about 2,250 M. Price to be \$15.50 per M. for merchantable and \$9.50 per M. for mill culls. Shipments to be made as follows: Lot 6 to be shipped by July 25th, and lot 7 by August 20th. Settlements to date from these dates in case the lumber is not moved. Lumber to be inspected by J. W. Ritchie, of Bay City, Mich. Terms 1½ per cent off for cash or 90 days' paper.

"Yours truly,

"J. & T. CHARLTON.

"Per W. T. CHARLTON."

The offer was accepted as follows:

"We hereby accept the above offer.

"H. M. TYLER LUMBER COMPANY,

"By H. M. TYLER,

"Vice-President."

After this agreement was entered into, an officer of the plaintiff came to Cheboygan, and examined and counted the piles of lumber, and checked it off on its memoranda. He did not place anyone in charge of the lumber, nor did he notify the dock owner of any change in the ownership, nor did the plaintiff place any insurance upon the lumber. Mr. Rogers continued in charge of the lumber as before. A large amount of insurance had been placed upon the lumber by the Charltons, the last of it about the middle of June. This insurance was not changed after the correspondence, but continued as before. On or about August 15, 1899, the plaintiff procured in the neighborhood of five hundred thousand feet of this lum-

ber to be shipped, for which an invoice was sent to plaintiff. On August 25, 1899, the plaintiff gave its check to the defendants Charlton for seven thousand nine hundred and fifty-eight dollars and seventy-one cents in payment of the same. Each party paid one-half the inspection bill.

The plaintiff did not move the lumber within the time mentioned in the correspondence. Its claim is that it could not get the boats to do so. It is the claim of the defendants that, had plaintiff been willing to pay current rates of freight, it would have had no difficulty in getting boats. The dock owner desired the room on the docks occupied by the lumber, and so notified Mr. Rogers, who ³⁰² notified the Charltons. The defendants urged plaintiff to move the lumber. It not having done so, the defendants sent it the following letter:

“North Tonawanda, N. Y., Sept. 12, 1899.

“The H. M. Tyler Lumber Company, North Tonawanda, N. Y.

“Gentlemen: You will please take notice that you are hereby required to carry out on your part the terms of the contract entered into between your company and ourselves, dated July 17, 1899, for the purchase by you of the lumber then piled on the docks of the Cheboygan Lumber Company, of Cheboygan, Michigan, before the 19th day of September, 1899. In case you do not have the lumber mentioned in said contract removed from those docks by that time, we shall consider forfeited whatever claim you might otherwise have to the lumber mentioned in said contract and not already removed. It is unnecessary for us to inform you that this lumber has already remained on the docks much longer than has been reasonably required to remove same, and that the continued storage of it is causing us large expenses.

“Respectfully yours,

“J. & T. CHARLTON.”

The plaintiff made no reply to this communication. On September 22d plaintiff had a tow at Cheboygan to take the lumber, but the defendants refused to deliver it. At that time Mr. Ritchie, the inspector, acting for plaintiff, made a demand upon Mr. Rogers, agent for the Charltons, for the lumber. He refused to accede to the demand. When the demand was made, no money or notes were tendered, and Mr. Ritchie had no money or notes to pay for the lumber if it had been delivered to him. The captain of the tow then telegraphed the plaintiff that the defendants refused to deliver the lumber. On

receipt of this telegram, Mr. H. M. Tyler and his brother called on Mr. Thomas Charlton, and demanded the lumber. He said his brother was absent, and refused to accede to the demand. He said, however, if the plaintiff would pay one dollar a thousand more for the lumber, he would take the responsibility of letting it go. Mr. Tyler then delivered to Mr. Charlton the following letter:

303 "A. M., September 22, 1899.

"Messrs. J. & T. Charlton, North Tonawanda, N. Y.

"Gentlemen: We have just received a message from Captain Little, of the Green tow, which says that he arrived at Cheboygan last night, and that your man refused to let him take away the lumber. We also have a telegram from the inspector, Mr. J. W. Ritchie, to the same effect; and this is to notify you that, in case we are unable to remove this lumber in consequence of such refusal, and there is any demurrage caused by delaying the tow there, we shall hold you responsible for it, and for all the damage we may sustain in consequence of your refusal to permit us to take this lumber. We have done our best to get a tow there, and finally got one by paying 50 cents per M. above the market rate, and they would have been there on the 19th had not Providence interfered with a terrible gale on Lake Huron, which held them a long time at Port Huron. If you need a settlement for any part of this lumber, we are and have been ready to make settlement at any time requested.

"Hoping that we may obtain this lumber at once, and save trouble and unpleasantness, which might otherwise occur, we remain,

"Yours very truly,

"H. M. TYLER LUMBER COMPANY,

"Dic. J. S. T.

By JOHN S. TYLER,

"Treas."

No money or notes were tendered at this time, unless what is said in the letter is regarded as a tender. It was the custom at Cheboygan for the manufacturer of the lumber to deliver the lumber on the rail of the vessel, and the expense of doing this was included in the price paid for manufacturing the lumber. Both parties knew of this custom.

After the refusal of the defendants to deliver the lumber, the plaintiff commenced this suit in replevin. Defendants gave the statutory bond, and kept the lumber. Upon the trial it was the claim of plaintiff that two piles of the lumber were marked "sold to the H. M. Tyler Lumber Company," and that

Mr. Rogers admitted to the sheriff he had so marked them. This was denied by Mr. Rogers, and it appeared he had never been directed or authorized ³⁰⁴ to so mark them. There is no claim that any change was otherwise made in the marks which were upon the lumber when the correspondence began. Upon the trial the plaintiff waived a return of the lumber. The court directed the jury that the title was in the plaintiff, and to assess its damages at the value of the lumber. The jury returned a verdict for upwards of thirty-one thousand dollars. The case is brought here by writ of error.

All of the counsel are agreed that the principal question in the case is, Did the title to the lumber pass to the plaintiff when it accepted the offer contained in the letter of July 17, 1899? The counsel for the plaintiff insist that, under the repeated rulings of this court, the title did pass, while the counsel for defendants urge just as strenuously that, under the rulings of this court, the title did not pass. The question involved has been before this court a great many times. The trouble is not so much with the rule of law as it is in the application of it to a given case. No two cases are alike, and what has been said by the court in a given case must be taken in connection with the facts of that case. If this is done, it will go far to reconcile any apparent inconsistencies in the decisions. Plaintiff relies upon *Whitcomb v. Whitney*, 24 Mich. 490; *Lingham v. Eggleston*, 27 Mich. 329; *Jenkinson v. Monroe*, 61 Mich. 461, 28 N. W. 663; *Wagar v. Detroit etc. R. R. Co.*, 79 Mich. 651, 44 N. W. 1113; *People v. Sheehan*, 118 Mich. 539, 77 N. W. 88, and other cases. The defendants rely upon *Lingham v. Eggleston*, 27 Mich. 324; *Hatch v. Fowler*, 28 Mich. 205; *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119; *Byles v. Colier*, 54 Mich. 1, 19 N. W. 565; *Wagar v. Farrin*, 71 Mich. 371, 38 N. W. 865; *Blodgett v. Hovey*, 91 Mich. 572, 52 N. W. 149; *Slade v. Lee*, 94 Mich. 128, 53 N. W. 929.

Lingham v. Eggleston, 27 Mich. 329, has, ever since the opinion was written by Justice Cooley, been regarded as a leading case. In that case, among other things, it is said: "In *Blackburn on Sales*, 123, the rule on this subject is very clearly and correctly stated as follows: The question, the ³⁰⁵ author says, is 'a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, and not before. In this as in other cases, the parties

are apt to express their intention obscurely; very often because the circumstances rendering the point of importance were not present to their minds, so that they really had no intention to express. The consequence is that, without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction, which, in their nature, are more or less technical. Some of them seem very well fitted to aid the court in discovering the intention of the parties. The substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which that contract is to attach are agreed upon. But, when the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfillment of any conditions; and when, by the agreement, the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or when anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transference of the property. But, as these are only rules for construing the agreement, they must yield to anything in the agreement that clearly shows a contrary intention.' . . .

"The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong, if not conclusive, evidence of intent that the property shall vest in him, and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterward. A striking case in illustration is that of *Young v. Matthews*, L. R. 2 C. P. 127, where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as, in the nature of the case, was practicable, was made. The court held that the question was one of intention merely, and that it was evident the ³⁰⁶ parties intended the title to pass. To the same effect are *Woods v. Russell*, 5 Barn. & Ald. 942; *Riddle v. Varnum*, 20 Pick. 280; *Bates v. Conkling*, 10 Wend. 389; *Olyphant v. Baker*, 5 Denio. 379; *Bogv v. Rhodes*, 4 G. Greene, 133; *Crofoot v. Bennett*, 2 N. Y. 258; *Cunningham v. Ashbrook*, 20 Mo. 553. So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity

and quality, and consequently the price to be paid, are still to be determined by the vendee: *Turley v. Bates*, 2 Hurl. & C. 290; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294. And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience—as, for instance, to load the goods upon a vessel for transportation—the property may pass by the contract of sale notwithstanding: *Whitcomb v. Whitney*, 24 Mich. 486; *Terry v. Wheeler*, 25 N. Y. 520. But the authorities are too numerous and too uniform to justify citation which hold that, where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.”

In *Byles v. Colier*, 54 Mich. 1, 19 N. W. 565, the same learned judge who wrote *Lingham v. Eggleston* said: “In *Lingham v. Eggleston*, 27 Mich. 324, it was decided that the question whether a sale is completed or only executory is usually one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale; that, where the goods sold are designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined—these being circumstances indicating intent, but not conclusive; but that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ³⁰⁷ ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things, in the absence of anything indicating a contrary intent, is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they appear to be in a state in which they may be and ought to be accepted. The case has been referred to with approval in the subsequent cases of *Hatch v. Fowler*, 28 Mich. 205; *Hahn v. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119; Wil-

kinson v. Holiday, 33 Mich. 386; Grant v. Bank, 35 Mich. 515; Scotten v. Sutter, 37 Mich. 526; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 974; Brewer v. Salt Assn., 47 Mich. 526, 11 N. W. 370. The cases elsewhere to the same effect are numerous, and many of them are collected in Mr. Bennett's note to section 319 of the third edition of Benjamin on Sales. And see Kelsea v. Haines, 41 N. H. 246; Southwestern Freight Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Shelton v. Franklin, 68 Ill. 333; Straus v. Minzesheimer, 78 Ill. 492; Crofoot v. Bennett, 2 N. Y. 258; Groat v. Gile, 51 N. Y. 431; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Dennis v. Alexander, 3 Pa. St. 50; Galloway v. Week, 54 Wis. 608, 12 N. W. 10; Caywood v. Timmons, 31 Kan. 394, 2 Pac. 566. That the cases referred to settle the general principle, at least for this state, is beyond question or cavil. Presumptively, the title does not pass, even though the articles be designated, so long as anything remains to be done to determine the sum to be paid; but this is only a presumption, and is liable to be overcome by such facts and circumstances as indicate an intent in the parties to the contrary."

It is believed all the cases cited by counsel come within the law as announced in these cases. If they do not, the court, in disposing of them, misapprehended the facts, for there has been no intention upon the part of the court to depart from the law of these cases.

In *Whitecomb v. Whitney*, 24 Mich. 490, after the agreement was made, advances had been made upon the agreement, and, after the lumber was manufactured, the defendant was notified of that fact. He sent an inspector, who came to the mill, and inspected all of the lumber. It was ³⁰⁸ drawn forty rods to a dock, ready to be loaded upon the vessel when one should be sent by defendant. Under the circumstances of that case it was held the title passed.

In *Jenkinson v. Monroe*, 61 Mich. 461, 28 N. W. 663, the agreement recited: "The party of the first part agrees to sell, and does hereby sell, and said parties of the second part agree to buy, and do hereby buy, all the lumber," etc. "The price of said lumber shall be fourteen dollars per M. feet, straight measure. Mill culls to be marked," etc.; "price at the time they are delivered on dock."

The logs were cut into lumber, which was delivered on the dock. The court held: "The piling on the dock seems to have been intended by both parties as a delivery of the lumber to

defendant, and who could thereafter ship it without reference to plaintiff."

In *People v. Sheehan*, 118 Mich. 539, 77 N. W. 88, it was agreed that Holmes should sell Sheehan curbstone, and that Sheehan should select it at Holmes' yard, "and when the curbstone was thus picked out, and delivered to Sheehan, it should belong to Sheehan, and Holmes would have nothing more to do with it." The court held the parties had agreed when the title should pass, and were bound by their agreement.

What are the facts in this case? Plaintiff and defendants both lived in the state of New York. The lumber was in charge of defendant's agent at Cheboygan, Michigan. They offered to sell this lumber to plaintiff, one quality at fifteen dollars and fifty cents a thousand feet, and the other quality at nine dollars and fifty cents a thousand feet. It could not be known how much there was of the lumber, nor how much there was of each of these qualities, until the lumber was inspected. An inspector was agreed upon, who was to act for both parties, and who was to be paid equally by them. There was no change in the possession of the lumber. It still remained under the control of Mr. Rogers for the defendants. It was in his possession when it was replevied. The defendants retained their insurance upon ³⁰⁹ the lumber. No notice was given to the dock owner of any change of ownership. When the lumber was shipped, it was to be put over the rail of the vessel by the mill owner, who, as a part of his contract with defendants, was to do this, and in doing it was acting for the defendants. No payment was made upon this lumber, except for the one shipment which had gone forward. Applying the law which we have quoted to the facts of this case, we conclude the title did not pass to the plaintiff.

Judgment is reversed, and as there is no substantial controversy about the facts, no new trial will be granted.

Montgomery, C. J., and Hooker and Grant, JJ., concurred.

Long, J., did not sit.

Whether a Sale of Personalty is Complete so as to vest title in the vendee is to be determined from the intent of the parties as gathered from the contract, the nature and situation of the thing sold, and the circumstances surrounding the sale: *Osborne v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591; *Commonwealth v. Hess*, 148 Pa. St. 98, 33 Am. St. Rep. 810, 23 Atl. 977. Delivery is essential to the completion: *State v. Wernwag*, 116 N. C. 1061, 47 Am. St. Rep. 873, 21 S. E. 683; *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151,

44 Pac. 357. Actual delivery, however, is not always necessary. Under some circumstances, the delivery may be symbolical: Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 53 Am. St. Rep. 300, 44 N. E. 411. Strictly manual delivery is not essential: Goodwin v. Goodwin, 90 Me. 23, 60 Am. St. Rep. 231, 37 Atl. 352. Designating the property and setting it apart may be sufficient: Commonwealth v. Hess, 148 Pa. St. 98, 33 Am. St. Rep. 810, 23 Atl. 977. But see New England etc. Co. v. Standard etc. Co., 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112. As to what is not a constructive delivery, see McCormick etc. Co. v. Balfany, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10. In general, as a sale is not complete until the identity, quantity, or price of the chattel is determined: Foley v. Felrath, 98 Ala. 176, 39 Am. St. Rep. 39, 13 South. 485. Compare Francis Chenoweth Hardware Co. v. Gray, 104 Ala. 236, 53 Am. St. Rep. 37, 15 South. 911; Cloke v. Shafroth, 137 Ill. 393, 31 Am. St. Rep. 375, 27 N. E. 702. If the sale is for cash, title will not ordinarily pass until payment, but payment as such a condition precedent may be waived: Scharff v. Meyer, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858.

DYER v. SKADAN.

[128 Mich. 348, 87 N. W. 277.]

ESCROW—A Deed Cannot be Delivered in Escrow to the Grantee.—Where there is a valid delivery of a deed by the grantor to the grantee, it is impossible to annex a condition to such delivery, and it vests title in the grantee, although this may be contrary to the intention of the parties. (p. 466.)

DEED—Delivery of.—If a deed made by a wife to her husband is signed and acknowledged by her, and handed to him with the understanding between them that if she survives him it is to be destroyed, and the title remain in her, but if he survives her, it should, after her death, be placed on record, she, however, retaining no right to control the deed, and his having it at all times in his possession, there is sufficient delivery to vest title in him, at least upon the event of her death. (pp. 466, 467.)

L. B. McArthur and Russell C. Ostrander, for the complainant.

Lawton T. Hemans and R. A. Montgomery, for the defendants.

348 MOORE, J. The relief sought by the bill in this case is the restoration and establishment of an unrecorded 349 warranty deed, claimed to have been executed to the complainant, Joseph L. Dyer, by his wife, Mary J. Dyer, during her lifetime, conveying a farm of one hundred and twenty acres in the township of White Oak, upon which they resided, which deed was lost after the grantor's death. It is the claim of the complainant that he paid for the land, and that the deed was taken

in the name of his wife because he was then ill, and it was thought he would not recover; that, recognizing his right to the property, his wife afterward deeded it to him. The bill also prays that complainant be decreed to be the absolute owner of the personal property on the farm at the time of the death of his wife. The answer denies that such a deed was ever executed, or that the complainant had any interest in the personal property, and claims that the title to the farm and personal property was absolutely in Mrs. Dyer at the time of her death. The circuit judge, in his decision, so clearly stated the questions involved that we quote from it here: "The controlling questions in the case are: Was the deed executed as claimed in the bill? Was it delivered so as to be legally effective to presently pass the title to the complainant? Was it, as complainant contends, lost after Mrs. Dyer's death?"

"The facts, as shown by the proofs (not considering the testimony of the complainant as to matters equally within the knowledge of deceased, which would be excluded by the statute), are substantially as follows:

"The farm in question was purchased in the fall of 1867, and the deed, dated October 31st of that year, was taken in the name of the wife, Mary J. Dyer. The parties took possession of the place, and continued to occupy it, with their family, in the ordinary way as a farm and home, until Mary J. Dyer died, in December, 1898. Since her death the complainant has continued in the use, occupation, and possession of the farm to the present time. July 5, 1884, Mary J. Dyer gave the complainant a life lease of the farm, which was not recorded until after her death.

"Some time in 1885 or 1886 (the date is not more precisely shown) the complainant and his wife visited the office of the Honorable M. M. Atwood, a well-known ³⁵⁰ lawyer residing at Dansville, in this county, where Mrs. Dyer made and executed a warranty deed of the farm to her husband, the complainant. The blank form of a warranty deed was used in preparing this instrument. It was drawn by Mr. Atwood, read over by him to the parties, signed by Mrs. Dyer, witnessed by Joseph McKnight and E. J. Smith, and the acknowledgment taken by Mr. Atwood. The consideration named therein was four or five thousand dollars (the proof does not show the amount more particularly), and it described the farm in question.

"After its completion, the deed was handed over by Mr. Atwood to the complainant. The understanding between the

parties was that, if Mrs. Dyer survived her husband, the deed should be destroyed, and the title still remain in her; but, if the complainant outlived his wife, he should, after her death, put the deed on record, and the farm should then be his. The parties appear to have understood that it was the recording of the deed which would give it vitality; that, while it remained unrecorded, the title to the farm would remain in the grantor, and that it would continue hers after his death, if she survived him, by the mere act of destroying the deed, and that the farm would only become his after her death, by recording the deed. It is immaterial that this view may have been incorrect legally; the fact is material as a part of the understanding of the parties upon which the deed was turned over to Mr. Dyer. It was with this understanding that Mr. Atwood, with the approval of Mrs. Dyer, handed the deed to her husband. The complainant took the paper, and kept it in their house under his own control, and separate from other family papers, until after her death. While she lived, whenever there was occasion to refer to the deed, the complainant would bring it out, and return it; but I am satisfied that Mrs. Dyer knew where it was kept, and could, if necessity required, have found and produced it. When the deed was made, there was no change in the possession, management or control of the farm. The conditions, in those respects, which had existed before its execution, continued thereafter as long as Mrs. Dyer lived.

“Not only the evidence as to what occurred when the deed was made, but the subsequent statements and conduct of Mr. and Mrs. Dyer, and their treatment of the property from the time of the execution of the instrument to her death, plainly show that it was made and delivered ³⁵¹ to Mr. Dyer, and accepted and held by him until her death, with the understanding that, if he survived her, he should get it recorded, and the title should then be his; but, if she survived him, it should be destroyed, and the title remain in her. It may not have been actually formulated in the mind of either that, to carry out this understanding, the title in the meantime should stand as it was before the conveyance, but it logically results that this must have been contemplated, for the title was to be his only in the event that he survived her—a contingency which might not happen. If that did not occur, the deed was never to be operative on the title. It can hardly be considered that it was their design that in the meantime the title should pass to Mr. Dyer, and go back to her if the uncertain future condition did not happen.

"Mrs. Dyer died in 1898. About two months after, complainant saw the deed for the last time. It has since been lost or destroyed without his connivance or fault.

"Complainant's claim to the personal property in question rests substantially upon the fact of his having a life lease of the farm upon which it was accumulated and grown, and his being the grantee in the deed in question. But whatever presumption or inference might ordinarily attach to such a situation is more than overcome by the proofs, which conclusively show that after the execution of the deed, and from then until not long before his wife died, he treated this property as though it belonged to his wife, and disclaimed any interest therein. If there was any personal property there to which he had title other than such as came from his life lease and the deed, it has not been pointed out by the proofs with such definiteness as enables me to distinguish or enumerate it.

"The decisive legal question, generally stated, to be determined, is this: Upon these facts, can this court, sitting in chancery, and upon the present bill, decree a restoration of the deed in question as a lost or destroyed instrument, and by virtue thereof establish the title of the complainant to the farm described therein? The instrument was a deed in form, but was testamentary in its nature. It was intended to operate as a conveyance of the title at the death of the grantor, provided the grantee outlived her. Its only practicable purpose was to convey the title to her husband at her death, if he survived her. It was a conditional testamentary conveyance, and the condition which was to give it vitality as a deed has happened ³⁵² by her death before her husband's. In my opinion, the circuit court, in chancery, has no original jurisdiction to hear and determine the matter, and the questions involved can only be heard and disposed of in the probate court."

Was the circuit judge right in holding the instrument to be a conditional testamentary conveyance, which only the probate court had jurisdiction to restore when lost? On the part of the defendants it is claimed that no deed in fact was ever executed before Mr. Atwood. We agree with the circuit judge that the proofs show very clearly such a deed was executed and delivered.

It is claimed by counsel for defendants that this case could hardly find a closer parallel than the case of *Wilson v. Wilson*, 158 Ill. 567, 49 Am. St. Rep. 176, 41 N. E. 1007. An inspection of that case shows the deed was to be recorded at the

death of the grantor in case he never called for it. It clearly appears the grantor reserved to himself the right to recall the deed. We think this distinguishes it from the case at bar.

In 9 American and English Encyclopedia of Law, second edition, 152, 153, it is said: "A deed takes effect at the time of its delivery. . . . Delivery is a word, act, or both combined, by which a grantor expresses a present intention to divest himself of title to property described in an appropriate deed."

In a note on page 153 it is said: "Delivery is 'the transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such manner as to deprive the grantor of the right to recall it at his option. An absolute delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor. A conditional delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event': Bouvier's Law Dictionary."

In *Dawson v. Hall*, 2 Mich. 390, it is said: "It is a well-settled rule of law that, if the grantor does not intend that his deed shall take effect until some condition ³⁵³ is performed, or the happening of some future event, he should either keep it himself, or leave it with some other person as an escrow to be delivered at the proper time. That it should operate as an escrow, it is necessary that the delivery should be made to a stranger, and not to the party; for, if one makes a deed, and delivers it to the party to whom it is made, as an escrow upon certain conditions, in such case, let the form of the words be whatever it may, the delivery is absolute, and the deed shall take effect presently as his deed, and the party to whom it is delivered is not bound to perform the condition; for 'in traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur': *Fairbanks v. Metcalf*, 8 Mass. 230; *Gilbert v. North America Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 513; 4 Comyn's Digest, tit. 'Fait (A3), Delivery,' and notes; 4 Cruise's Digest, 36; 1 Sheppard's Touchstone, 58." See *Beers v. Beers*, 22 Mich. 42.

In *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426, where a deed had been delivered to a third party, to be delivered at the death of the grantor, the court said, at page 193 (59 Mich., 60 Am. Rep. 296, 26 N. W. 429): "The other deed held by Mallory depends on other considerations. If the deed had been delivered to him irrevocably, on the simple condition that he should transfer it to de-

fendant on the death of Aden Taft, it would come within several of our own decisions, and might, therefore, be valid upon their authority: *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380. There is much authority elsewhere in favor of the same doctrine. But it has not been decided here, or in most of the cases elsewhere, that this rests on the doctrine of escrow. It was said in *Foster v. Mansfield*, 3 Met. (Mass.) 412, 37 Am. Dec. 154, that, where a deed is deposited with a third person, and 'the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but, when thus delivered, it will take effect, by relation, from the first delivery.' The same distinction is suggested in other ³⁵⁴ cases, where such a delivery is held valid: *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 77; *Fairbanks v. Metcalf*, 8 Mass. 230." See *Gage v. Gage*, 36 Mich. 229.

In *Darling v. Butler*, 45 Fed. 332, it is said: "The rule is ancient and familiar that a deed cannot be delivered in escrow to the grantee. When there is a valid delivery of a deed by the grantor to the grantee, it is impossible to annex a condition to such delivery; and the delivery vests the title in the grantee, although it may be contrary to the intention of the parties. 'When the words are contrary to the act which is the delivery, the words are of none effect': *Coke on Littleton*, 36a. 'If I seal my deed, and deliver it to the party himself to whom it is made, as an escrow upon certain conditions, etc., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently': 1 *Sheppard's Touchstone*, 59. The modern cases recognize the doctrine fully, and apply it wherever it appears that the grantor intended to deliver and the grantee intended to accept the instrument as a conveyance without further act on the part of the grantor: *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Brackett v. Barney*, 28 N. Y. 333; *Braman v. Bingham*, 26 N. Y. 483; *Hinchliff v. Hinman*, 18 Wis. 138; *Ordinary v. Thatcher*, 41 N. J. L. 407, 32 Am. Rep. 225."

There is nothing in the testimony indicating the parties to the deed expected that Mrs. Dyer might control the deed dur-

ing the lifetime of her husband, or that she could recall it. The most favorable view for the defendants that can be taken of the testimony is that Mr. and Mrs. Dyer both supposed that, if the deed was not recorded by Mr. Dyer, in the event of his death all it was necessary to do to reinvest the title in Mrs. Dyer was to destroy the deed. Whether it is said there was an unconditional delivery of the deed to the grantee, expecting it would take immediate effect, as claimed by Mr. Dyer, or whether it was expected the deed would not take effect until the death of the grantor, cannot, we think, under the authorities, ³⁵⁵ make any difference with the result. The testimony shows the deed was delivered to the grantee, the grantor not reserving any right of control over it. In the one case the title would pass at once. In the other case the grantee would not be in a less favorable position than he would have been had the deed been delivered to a third party with directions to deliver it upon the death of the grantor. We have already seen that, in the last-mentioned case, the title would take effect when the deed was delivered by the third party, and, except as to intermediate rights, when thus delivered it would take effect by relation from the first delivery. We think the deed should have been restored as prayed for in the bill of complaint.

Under the testimony in the case we are not prepared to pass upon the question of the title to the personal property. We decline to make any decree in relation thereto, but leave the parties to any remedy which they have at law.

The decree of the court below is reversed, and one may be entered here in accordance with this opinion.

The other justices concurred.

A Deed Placed in Escrow beyond the control of the grantor, to be delivered to the grantee upon the death of the grantor, is valid: *Lippold v. Lippold*, 112 Iowa, 134, 84 Am. St. Rep. 331, 83 N. W. 809; *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215, 45 N. E. 1021. It is otherwise, however, if the delivery to the third person is conditional, or the grantor retains any control over the instrument: *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 210, 58 N. E. 429; *Williams v. Daubner*, 103 Wis. 521, 74 Am. St. Rep. 902, 79 N. W. 748; *monographic note to Brown v. Westerfield*, 53 Am. St. Rep. 554.

COMMON COUNCIL OF DETROIT v. SCHMID.

[128 Mich. 379, 87 N. W. 383.]

STATUTES—Title of—Changing After the Introduction of a Bill.—If the object of an act is fairly expressed in the title, the form of the title at its introduction or during any stage of legislation before it becomes a law is immaterial. (p. 470.)

STATUTES.—The Title of an Amendatory Act Need not be More Specific than the title amended, if there is nothing in the former which might not have been incorporated in the latter under its existing title. Whatever might have been incorporated in the original act under its title may be added by way of amendment under the most general title. (pp. 470, 471.)

STATUTES—Substituting One for Another.—The section of the constitution of Michigan providing that no bill shall be introduced in the legislature after the expiration of the first fifty days of the session, does not prevent the substituting of one bill for another after that period, if the subject matter of the substituted bill is germane to the original purpose indicated by the title of the original bill. (pp. 474, 475.)

CONSTITUTIONAL LAW—Public Officers—Extending Term by Postponing the Time for the Election of Their Successors.—An act amending the charter of a city, and thereby fixing such a time for the next election of officers that the terms of those in office must necessarily be prolonged, does not operate as an appointment of officers by the legislature, and is not unconstitutional. (p. 477.)

Mandamus by the common council of Detroit to compel the necessary steps to be taken to hold an election. The writ was denied, and the relator brought certiorari.

Timothy E. Tarsney, for the relator.

John J. Speed, Robert T. Speed, Fred. A. Baker, and John W. Beaumont, for the respondents.

381 LONG, J. For the purpose of testing the constitutional validity of an act of the legislature of 1901, approved May 21, 1901 (Act No. 437, Local Acts 1901), establishing biennial instead of annual city elections, the common council of the city of Detroit instructed the city clerk to take the necessary steps for the registration of voters for an election to be held on the first Tuesday after the first Monday of November, 1901, and also instructed the commissioner of public works to cause polling booths to be erected for the purpose of such registration and election. The city clerk and commissioner both refused to follow the instructions of the common council, basing their refusal upon the validity

of said act of May 21, 1901. Mandamus proceedings were thereupon instituted against the city clerk and commissioner in the circuit court for ³⁸² Wayne county, and an order to show cause was issued to said officers. Upon a hearing before four of the Wayne circuit judges, sitting in bank, the mandamus was refused, Judge Hosmer dissenting on the ground that the act was in violation of section 28, article 4, of the constitution of this state. The proceedings are before this court upon certiorari to review the action of the circuit judges.

Previous to the passage of the act of May 21, 1901, annual city elections were held in Detroit in November and April of each year. Section 1, chapter 2 of the act of 1901, provides that no election shall be held in November, 1901, and abolishes annual city elections. It provides for a biennial city election on the first Tuesday after the first Monday in November, 1902, and every second year thereafter, in connection with the general state election. It provides also for a biennial spring election on the first Monday of April, 1903, and every second year thereafter, in connection with the state judicial election. These were the only material changes in this section. Section 2, chapter 2, was amended so as to conform to the change from annual to biennial elections. Section 13, chapter 2, was changed to cure a claimed existing defect in the boards of registration, and has no bearing upon the change from annual to biennial elections. Section 1, chapter 4, was also amended so as to conform to the change to biennial elections. Section 25, chapter 4, was amended so as to define a vacancy in office under the charter.

The constitutionality of the act of 1901 is attacked upon two grounds: 1. That it was not introduced in either branch of the legislature within the first fifty days of the session; 2. That, in effect, it operates as an appointment by the legislature of the local city officers.

It appears that a bill was introduced in the House within the first fifty days of the session, to wit, on February 12, 1901, entitled: "A bill to amend section 2 of chapter 4 of an act entitled 'An act to provide a charter for the city of Detroit, ³⁸³ and to repeal all acts and parts of acts in conflict therewith,' approved June 7, 1883."

The bill thus introduced was amended after the first fifty days, the substituted bill being entitled: "A bill to amend sec-

tions 1, 2 and 13 of chapter 2, and sections 1 and 25 of chapter 4, of an act entitled 'An act to provide a charter for the city of Detroit, and to repeal all acts and parts of acts in conflict therewith,' approved June 7, 1883."

It appears that the bill as finally passed did not amend section 2 of chapter 4 of the charter, but amended sections 1, 2, and 13 of chapter 2, and sections 1 and 25 of chapter 4, of the act entitled "An act to provide a charter for the city of Detroit," etc. It is the contention of relator that inasmuch as section 2, chapter 4, which was proposed to be amended by the bill as introduced, has reference to an entirely different subject than the bill as finally passed as amended after the first fifty days, the act passed is void as contravening section 28, article 4 of the constitution, which provides that "no new bill shall be introduced into either House of the legislature after the first fifty days of a session shall have expired"; and it is further contended that the act is also void under the provisions of section 20, article 4, of the constitution, which provides that "no law shall embrace more than one object, which shall be expressed in its title." The argument upon this latter question is that, because the title as introduced is an index to the subject matter of the bill, the substitute, introduced after the first fifty days, is void, as it is broader than the title as introduced, and is not germane to the general purpose as expressed in the title.

This latter objection has, we think, no force whatever. The exact question was passed upon in *Attorney General v. Rice*, 64 Mich. 387, 388, 31 N. W. 204. It was there said: "The attorney general contends that the constitution (article 4, section 20) was violated in its spirit, because the title of the bill as introduced did not express the object of the ³⁸⁸ act as passed. We cannot extend the provisions of the constitution beyond its express terms in this respect. If the object of the act as passed is fully expressed in its title, the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. To hold otherwise would, in many cases, prevent any alteration or amendment of a bill after its introduction, as, in legislative practice, it frequently becomes necessary to amend the title as introduced in order to conform to changes in the bill. The title to a bill is usually adopted after it has passed the House, and is not an essential part of the bill,

although it is of a law"—citing *Larrison v. Peoria* etc. R. R. Co., 77 Ill. 17.

This question again arose in the case of *Hart v. McElroy*, 72 Mich. 452, 40 N. W. 752, and the doctrine laid down in the *Rice* case was reiterated, and it was said: "In the present case, therefore, the act is not unconstitutional because the title of the bill as introduced differed from the title of the substitute, or the act as passed."

An inspection of the title and the act as passed shows that there is no constitutional objection to the sufficiency of the object as stated in the title. The amendments to the act are germane to the general object stated in the original title.

The fact that the amendments were made to the bill does not render the act void under section 28 of article 4 of the constitution. It is not a new bill, within the meaning of that section. It is well-known history in this state that most of the acts passed by the legislature are passed after the first fifty days of the session, and many, if not most, of them amended after the first fifty days. That subject has had consideration by this court in many cases. As early as 1878, in the case of *People v. Judge of Superior Court of Grand Rapids*, 39 Mich. 195, the question was presented. The act thereunder consideration purported by its title to revise and amend several sections of an old statute, and to add several new sections. The particular provision in question was contained in a section numbered ³⁸⁵ 7, which corresponded in number with an old section, which was not mentioned in the title. The act was upheld. The title to that act is as follows: "An act to revise and amend sections 6, 11, 13, 19, and 21 of an act entitled 'An act to provide for a municipal court in the city of Grand Rapids, to be called "The Superior Court of Grand Rapids,"' being Act No. 49 of the Session Laws of 1875, approved March 24, 1875, and to add six new sections to the act, to stand as sections 24, 25, 26, 27, 28, and 29": Act No. 147, Pub. Acts 1877.

It will be noted that section 7 was not referred to in the title. The sections added by amendment, to wit, 24, 25, 26, 27, 28, and 29, refer to the stenographer of the court—a subject in no way germane to that embodied in section 7. The only notice, therefore, of a purpose to introduce an amendment which would affect the provisions of section 7 as they stood in the original act, was the notice of a title to amend

other named sections of the act, and the law could only have been upheld upon the view that the notice of an amendment to a section of an act admits of the introduction of any amendment within the original title of the act.

In *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367, the objection to the act was, as here, that it was not introduced until after the expiration of fifty days of the session, although the constitution provides that "no new bill shall be introduced after the first fifty days of a session shall have expired." The facts of the case were shown to be that, within the fifty days, a bill was introduced for the organization of the township of Montmorency, and after the fifty days had expired the bill was amended to provide for the organization of the county of Montmorency. It was the contention that this was the introduction of a new bill. This court upheld the legislation. The following cases also uphold the general doctrine that, where the amendments are germane to the general object stated in the title to the original bill, such amendments are valid: *Board of Supervisors of Chippewa Co. v. Auditor General*, 386 65 Mich. 408, 32 N. W. 651; *Attorney General v. Amos*, 60 Mich. 372, 27 N. W. 571; *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203; *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750; *People v. Howard*, 73 Mich. 10, 40 N. W. 789; *Holden v. Osceola Co. Supervisors*, 77 Mich. 202, 43 N. W. 969; *Caldwell v. Ward*, 83 Mich. 13, 46 N. W. 1024; *Toll v. Jerome*, 101 Mich. 468, 59 N. W. 816; *Davock v. Moore*, 105 Mich. 133, 63 N. W. 424, *City of Detroit v. Wayne Circuit Judge*, 112 Mich. 317, 70 N. W. 894; *Fort Street Union Depot Co. v. Commissioner of Railroads*, 118 Mich. 340, 76 N. W. 631; *Springer v. City of Detroit*, 118 Mich. 69, 76 N. W. 122; *Renackowsky v. Board of Water Commrs. of Detroit*, 122 Mich. 613, 81 N. W. 581.

In *Holden v. Osceola Co. Supervisors*, 77 Mich. 202, 43 N. W. 969, it was said: "Most of the great changes in our city organizations have come in under laws which did no more than to indicate by their titles a purpose to incorporate, or reincorporate, or revise the corporate charter of the municipality dealt with. Anything which is meant to form a permanent element in municipal arrangements is pertinent to the incorporation."

In *People v. Howard*, 73 Mich. 10, 40 N. W. 789, it was said: "Acts entitled acts to amend a named act are not ob-

noxious to the constitution, if the amendment fairly comes within the scope of the title of the original act."

In *Fort Street Union Depot Co. v. Commissioner of Railroads*, 118 Mich. 340, 76 N. W. 631, it was said: "The important question is, What is requisite to the title of the amendatory act? Must it call attention to the fact that the scope of section 3 [Act No. 198, article 3, Laws 1873] is to be enlarged, and mention the corporations to be included, either by name or generically, or must everyone take notice that section 3 is liable to be amended in any particular, and to any extent, within the terms of the original title? . . . Many authorities support the rule that the title of the amendatory act is sufficient, and will support any legislation that would have been permissible ³⁸⁷ under the original title when the law amended was enacted, if the amendatory act refers by chapter or section to the act amended, giving its title, although the practice has been criticised. Thus, in the case of *People v. Judge of Superior Court of Grand Rapids*, 39 Mich. 197, such an amendment was sustained, notwithstanding the title incorrectly stated the number of the section sought to be amended. In *People v. Gadway*, 61 Mich. 290, 1 Am. St. Rep. 580, 28 N. W. 102, Mr. Justice Champlin says: 'In applying the constitutional test to this law, it must be regarded as if section 15 [Act No. 178, Pub. Acts 1883] was embraced in the original when passed; and, if it is embraced in the title of the act of 1881, it is valid; otherwise, not.'

"It is fair to say that it is not clear that the exact question before us was discussed in that case, as apparently both court and counsel took it for granted that the case must turn upon the title to the original act.

"The case of *Holden v. Osceola Co. Supervisors*, 77 Mich. 202, 43 N. W. 969, is also in point, Mr. Justice Campbell saying: 'It is undoubtedly competent to introduce by amendment anything which might have been introduced in the original act.' The title to the act in that case, as in this, referred to a section, and not to the act. It was as follows: 'An act to amend section 3 of Act No. 331,' etc., 'entitled,' etc.: Act No. 342, Local Acts 1889.

"The question was before this court again in *People v. Howard*, 73 Mich. 10, 40 N. W. 789. This was a criminal case and the title was 'An act to amend chapter 154 of the Revised Statutes of 1846, being chapter 180 of the Compiled

Laws, entitled "Of Offenses against the Lives and Property of Individuals": Act No. 116, Laws 1867. The object of this amendment was to create a new offense, and a felony at that; yet the law was held valid."

In the case of *Renackowsky v. Board of Water Commrs. of Detroit*, 122 Mich. 613, 81 N. W. 581, the case of *City of Detroit v. Wayne Circuit Judge*, 112 Mich. 317, 70 N. W. 894, was approved. The *Sackrider Case*, 79 Mich. 59, 44 N. W. 165, and *Plank-Road Case*, 97 Mich. 589, 56 N. W. 943, which seem to be relied upon by counsel for relator, were distinguished from the other cases by Mr. Justice Montgomery in *Toll v. Jerome*, 101 Mich. 471, 59 N. W. 816.

³⁸⁸ It seems, therefore, that the law is fully settled in this state that whatever might have been incorporated into the original act under the title of such original act may be added by way of amendment under the most general title. The substituted bill and title in the present case indicate the same general purpose as the original title. The notice to be imputed from the original title is of a change in the city charter of Detroit. It was certainly not to be a re-enactment of section 2, chapter 4, but a change, the extent of which could be disclosed only by an inspection of the original bill; and presumptively such inspection would have disclosed the change actually and finally made. Nor would the original title itself have indicated the nature of the change. A proposed amendment to section 2, chapter 4, would convey no knowledge of the amendment without an inspection of the body of the bill. The only information conveyed by such title would be that the charter itself was to be in some manner amended. The notice, therefore, was of a change in the charter. The titles of both the original and substituted bills indicate such a change. Both titles, therefore, disclose the same general purpose.

In *Attorney General v. Amos*, 60 Mich. 372, 379, 27 N. W. 571, the original bill amended sections 3 and 4 of chapter 1 of an act entitled "An act to provide a charter for the city of Detroit," and the substituted bill was entitled "A bill to amend sections 3, 4, and 5 of chapter 1 and to add five new sections to Act No. 326 of the Session Laws of 1883, entitled 'An act to provide a charter for the city of Detroit.'" It was said by the court that "the bill had for its object the amendment of the charter of the city of Detroit."

A bill to vacate one judicial circuit, and to reorganize another, was held in *Toll v. Jerome*, 101 Mich. 468, 59 N. W. 816, to be of the same general purpose as a bill to require the judge of the former circuit to hold court in the latter.

In *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203, it was said: "The journal of the Senate positively states that a bill ³⁸⁹ was introduced to organize the township of Au Train. If such a bill was introduced, it would be presumed that the bill substituted, to organize the township of Ironwood, had in view the same general purpose as the first bill—to give to the inhabitants of the territory described a distinct municipal government."

And in *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750, it was said: "We have no right to presume that the body of the substitute was not germane to the body of the [original] bill."

We must therefore hold that the act is not defective, as claimed.

The claim of counsel for relator that the act operates as an appointment of local city officers by the legislature cannot be sustained. Apparently it was not claimed in the court below, and it is not claimed here, that the legislature had no power to change the time of holding elections in the city of Detroit; but the contention is that the effect of the act is to continue in office the present city officers beyond the terms for which they were elected, and this operates as an indirect appointment by the legislature. The constitution directs, by section 13, article 15, that "the legislature shall provide for the incorporation and organization of cities and villages." Under this provision the legislature directs what the nature of the organization shall be; what officers shall be elected or appointed; their terms of office; their powers, duties, and compensation; when vacancies shall exist, and how they shall be filled. This power to so prescribe is within the scope of the power to organize the municipality. Then follows a provision in section 14 of the same article of the constitution that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct." It is argued by Judge Speed, counsel for respondents, that: ³⁹⁰ "It must be conceded that the authority to organize and the authority to prescribe the time and manner of election and appointment of officers of a city is a continuing power, which may be exer-

cised and re-exercised at the pleasure of the legislature; that, having provided for annual city elections, the legislature may abolish the annual city election and substitute biennial elections, and may fix the time and prescribe the manner of conducting such, biennial election; and that such change must necessarily involve or require some legislation, or bring into operation some existing provisions, as to the officers whose terms may be affected by the change.

"It is, however, claimed [by relator] that there is in this language granting an express power to fix the time of holding such elections an implication which forbids the fixing of such a time for holding the election that the officers then in office would hold over, for the reason that such holding over violates a further implication that officers of cities or villages shall be elected or appointed by local authority, and a holding over by authority of the legislature is in effect an appointment by the legislature; that is to say, the express power to prescribe the time and manner of election is limited or controlled by the implication that the legislature shall not fix a time which would have the effect to leave anyone in office for any time beyond that for which he was elected. . . . A concession to the claim of relator would require the legislature, if it fixed a time, as in the present instance, for holding the election after the expiration of the terms of existing officers, to provide for the holding of an ad interim election of officers for the time intervening between the expiration of present terms and the new election; and the constitution, notwithstanding its very plain language, must be read as if it contained this requirement."

There is great force in these suggestions, and they lead to an inquiry as to the term for which the present city officers were elected. Section 5, chapter 4 of the charter of the city of Detroit, provides: "All officers, whether elected or appointed, shall hold their offices respectively until their successors shall be duly elected or appointed and qualified, and shall enter upon the discharge of their duties."

The act under consideration nowhere refers to the existing
391 officers, and makes no express extension of their terms of office. If such officers are continued in office, it is not by virtue of this act, but by virtue of the above provision of the charter of Detroit. This was the unanimous decision of the court below. It was said by that court:

"We do not think that the question of local self-government is involved in these cases at all. The present city officers were elected by the people, under the law that then existed, and with full knowledge of the law, to hold their offices for the full term for which they were elected. What was that term, under the law? It was just this: That they should hold their offices for the full time specified in the law for each officer, respectively, and until their successors were elected and qualified. Under the law they hold their offices, not by legislative appointment, but by the votes of the people constitutionally recorded, and from no other authority.

"That the legislature has the right to change the time of holding elections was not questioned on the argument, nor can it be successfully questioned. By the change a contingency has arisen whereby either new officers have to be elected, or the offices remain vacant, or the present officers hold over during the interim. It is not necessary to discuss the first two of these propositions, for the answer to the third eliminates them from the discussion. The present officers do hold over, because the law says so, and the people elected them knowing that in such a contingency they would hold over": *Common Council of Detroit v. Schmid*, 8 Det. Leg. News, 583.

We fully agree with the court below in this statement, and with the contention made by Judge Speed in his brief. This seems to be the established and unquestioned rule wherever the question has arisen. In *State v. Menaugh*, 151 Ind. 260, 271-273, 51 N. E. 117, 357, a similar question is discussed. It appears that the Indiana constitution expressly prohibits the legislature from creating any office for a longer term than four years, but under the constitution an officer holds until his successor is elected and qualified. The constitution also provides that the officers in question "shall be elected or appointed in such manner as may be prescribed by law": 392 Const. art. 6, sec. 3. The legislature changed the time of the election, the effect of which was to continue the incumbent officers in office for a period of two years beyond the constitutional limit, and this legislation was attacked on that ground. The court said: "An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit. It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the

time of holding an election for township trustees, etc., shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day 'of every fourth year thereafter.' . . . The statute in question makes no reference to present incumbents. It neither pretends nor attempts to abridge or enlarge their tenure. . . . Consequently, if incumbent trustees are permitted to hold beyond four years, it cannot, in legal contemplation, be attributed to the provisions of the act in controversy, but will be due to the force and effect of the provision of the constitution last mentioned."

Again the court said: "In consideration of this constitutional provision, the electors of this state, when, by their ballots, they designate a person to fill a public office the tenure of which is prescribed either by the constitution or some statute, must be presumed to understand and know that the contingent holding of the officer until his successor is elected and qualified is as much a part of the term for which he is elected as is that which is expressly prescribed and fixed."

In *State v. Ranson*, 73 Mo. 78, the hold-over provision was apparently a statutory, and not a constitutional, one. The Missouri constitution provided that the term of an officer should not be "extended for a longer period than that for which such officer was elected or appointed." The legislature changed the time of holding the election so that no election could be held until two years after the end of the term of the officer in question. It was held ³⁹³ that the time intervening between the end of the term of an officer and the election of his successor "is as much a part of his term of office as the four years that preceded it."

In *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778, it was held that the legislature may make reasonable changes, by amendments to existing laws, in respect to the time of holding elections for the offices then under consideration (to wit, municipal judges), and in such case incumbents previously elected for an existing term, and until their successors are elected and qualified, may hold over during the interval; that such act would not be unconstitutional, unless the change left the incumbent in office for such unreasonable time as to raise the presumption of a design to deprive the office of its elective character. The following cases lay down the same doctrine: *State v. McCracken*, 51 Ohio St. 123, 36 N. E. 941; *State v.*

McGovney, 92 Mo. 428, 3 S. W. 867; Christy v. Sacramento Co. Supervisors, 39 Cal. 3.

It is said by counsel for relator, however, that, if the legislature can place the election one year beyond the term for which such officers were elected, it can extend it ten or any number of years. That question was referred to in *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778, by the Minnesota court, and the court said: "The constitution is satisfied if provision is made by law for the election of such officers at stated periods, unless these periods are fixed at times so far remote from each other as to raise the presumption of a design substantially to deprive these offices of their elective character."

In that case the election was put off for more than one year, and it was said by the court: "The legislature are not at liberty to abuse their authority in such cases, and we cannot presume that it has done so in this case. . . . We are not authorized in holding this to be an unreasonable change, and we are not warranted in imputing to the legislature any unworthy purpose in making it; nor is the incidental result that the ³⁹⁴ respondents hold over in the interval, by virtue of the terms of the previously existing statute, in itself sufficient to show an intention to deprive the office of its elective character."

In the present case the period fixed for holding the election continues the incumbents in office under the terms of the charter one year. This is not unreasonable, especially as it saves the city of Detroit the expense of an election in November, 1901, and the spring of 1902, and places the election at times when the general state elections are to be held.

Counsel for relator, however, cites several cases which he claims hold the doctrine for which he contends. We think the cases cited by him may be readily distinguished. In the case of *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302, the statute under consideration (N. Y. Laws 1866, c. 217) was entitled "An act to extend the term of the office of the justice and clerk of the district court." etc.; and Mr. Justice Folger, in deciding the case, says: "He [respondent] placed his title to it after the expiration of the six year term explicitly upon the legislative continuance of him in it by the act of 1866. Such is his answer in the case, and no other right or title is set up. And upon this he must stand."

In *People v. McKinney*, 52 N. Y. 374, the claim was made that respondent was entitled to the continuance of his office of collector of taxes by virtue of "An act for the extension of the

term of office of collector of taxes in the several towns of Kings county": N. Y. Laws 1870, c. 364.

In *State v. Krez*, 88 Wis. 135, 59 N. W. 593, it also appears that the legislature, by express provision, sought to extend the term of office of city attorney, and the court held that this could not be done. None of these cases is in conflict with the rule laid down by the circuit judges in the present case.

We think the act valid, and that the mandamus was properly denied. The order will be affirmed.

³⁹⁵ In the Ruoff case a vacancy exists by the resignation of the alderman in the fifteenth ward of Detroit. It follows from what we have said that that vacancy cannot be filled by general election until November, 1902. The court below ordered a special election to be held to fill such vacancy on the eighth of the present month. That order must be affirmed. That time having now elapsed, the council will undoubtedly call the special election at some future date.

Montgomery, C. J., and Hooker, J., concurred with Long, J.

The Dissenting Opinion was written by Judge Grant. In it he stated, at considerable length, the history of the bill in question, and that for which it was substituted. He referred to the great number and variety of subjects included in the municipal charter, and the various chapters thereof, and insisted that it was not competent by a statute whose title purported merely to amend the charter, or some chapter thereof, to legislate upon subjects respecting which the title gave no warning. He also combated the proposition that if the object of the act, as passed, were expressed in the title, "the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial."

Judge Moore concurred in this dissent.

The Titles of Statutes, including those of amendatory acts, are exhaustively discussed in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

Public Office.—A *Statute* extending the term of an incumbent in office, enacted subsequently to his election, is held unconstitutional in *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302.

RYAN v. TOWAR.

[128 Mich. 463, 87 N. W. 644.]

LICENSE to Enter Upon Lands of Another—What is not.—The mere toleration of trespassers does not alone constitute a license, and certainly not an invitation. (p. 482.)

CHILDREN—License to.—As to the question of license or invitation, there is no difference between children and adults, and the failure to prevent their trespassing upon premises does not constitute a license or invitation for them to continue so doing. (p. 483.)

TRESPASSERS—Duty of Owner of Premises to.—There is no duty imposed on the owner of premises to keep them in a suitable condition for those who come there for their own convenience merely, without the invitation of the owner. (p. 483.)

CHILDREN Trespassers Injured by Dangerous Machinery are not entitled to recover therefor, though it was naturally calculated to attract them to the premises. The "Turntable cases" disapproved. (p. 494.)

CHILDREN TRESPASSERS.—Persons Going to the Rescue or Assistance of a Child and injured by dangerous machinery left unguarded cannot recover of the land owner on whose premises it is, and who has not licensed or invited anyone to enter thereon. (p. 495.)

Action to recover for personal injuries. The court directed the jury to return a verdict for the defendant, and plaintiff appealed.

T. J. Dundon, E. J. Mapes, and J. L. Heffernan, for the appellant.

Clark & Pearl, for the appellee.

⁴⁶⁴ **HOOKE**R, J. The Bice Manufacturing Company is an existing corporation, which formerly carried on a manufacturing business at Marquette. Its plant has been shut down for some years. Among other structures, it owned a small pump-house, located upon ground owned by a railroad company, under an arrangement between them. In the house was a small overshot water-wheel. The plaintiff, a girl between twelve and thirteen years of age, was in the habit of passing this pump-house on the way to school, with her brothers and sisters, going across lots through the field, because it was nearer. For some time previous to the time of the accident through which plaintiff received her injury, a hole existed in the stone wall of the house ⁴⁶⁵ inclosing the wheel, through which children went to play on the wheel. What evidence there is on the subject justifies the inference that it was made by children, and from time to time enlarged, by tearing out the stone of which the wall

was built, for the purpose of entry to the wheel. On the day in question, the brothers of plaintiff, on their way from school, crawled through this hole, and, mounting the wheel, were able by their weight to turn the wheel part way round and back. A younger sister, aged eight years, got caught between the wheel and the wheel-pit. The plaintiff heard her screams, and went through the hole to her succor, and aided in reseuing her, and was herself injured. Suit was brought against the corporation and two of its directors, and the negligence alleged was in permitting the wheel to remain there, accessible to children. The court directed a verdict in favor of the directors, and allowed the jury to determine the liability of the corporation, against which they rendered a verdict for five thousand dollars. From a judgment in favor of the directors, the plaintiff has appealed. The only error assigned is the direction to return a verdict in favor of the directors.

The testimony shows that the buildings of the Bice Manufacturing company were upon land owned by the railroad company, and that such land, together with the railroad, consisting of several tracks, was fenced. The plaintiff was not shown to have been invited upon the premises, but there is testimony from which the jury might reasonably conclude that children were in the habit of crossing the land of the defendant company and the railroad, and that neither company took steps to prevent it, further than to keep up the fences. It is contended that this amounted to an invitation or license, but we think not. Mere toleration of a trespass does not alone constitute a license even, certainly not an invitation: 1 Thompson on Negligence, 2d ed., sec. 1050, and note. The pedestrians who insist upon risking their lives by making a footpath of a railroad track, and others who habitually shorten distances by making footpaths across the corners of village ⁴⁶⁶ lots, are none the less trespassers because the owners do not choose to resent such intrusion, and be to the expense and trouble of taking effective measures to prevent it. There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they roam at will over private premises, and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd

of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed them to do so, is to our minds an unreasonable proposition. As to this question of license or invitation, there is no difference between children and adults.

In the case of *Sturgis v. Detroit etc. Ry. Co.*, 72 Mich. 619, 40 N. W. 914, Mr. Justice Campbell said: "It is impracticable to keep off trespassers from an open track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use": See, also, *O'Neil v. Duluth etc. Ry. Co.*, 101 Mich. 437, 59 N. W. 836.

In *Clark v. Michigan Cent. R. R. Co.*, 113 Mich. 24, 67 Am. St. Rep. 442, 71 N. W. 327, it was contended that a common practice of crossing a railway, of twenty years' duration, established an easement or a license or invitation, which made it incumbent upon the company to keep the premises free from obstructions, such as a semaphore wire along and a few inches above the surface of the ground. It was held that it proved neither, and that those who ⁴⁶⁷crossed were technical trespassers. Numerous authorities were cited, and the question cannot be considered an open one in this state.

It is a general and nearly uniform rule that there is no duty imposed upon the owner of premises to keep them in a suitable condition for those who come there for their own convenience merely, without the invitation of the owner. The origin of the alleged modern doctrine may be said to practically rest upon what are called the "Turntable cases," the first of which was the case of *Railroad Co. v. Stout*, 17 Wall. 657. The opinion was written by Mr. Justice Hunt in the year 1853. A child of six years of age was hurt while playing with others upon a turntable, by getting its foot caught between the ends of the rails. The turntable was in a remote place, not far from a public highway, on ground belonging to the company. The trial court charged the jury "That, to maintain the action, it must appear . . . that it was a dangerous machine—one which, if unguarded or unlocked, would be likely to cause injury to children; . . . that the jury were to consider whether, situated as it was, as the defendant's property, in a small town, somewhat remote from habitations, there was

negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The only question in the case was whether the child was a trespasser, and for that reason could not recover. This case practically laid down the rule "that a railroad company might be liable to trespassers for injuries resulting from its failure to construct, locate, manage, and maintain its turntable with that care and attention to prevent accidents which prudent and careful men ordinarily bestow"; and it held that while "the evidence was not strong, and the negligence was slight," the court was "not able to say that there was not evidence sufficient to justify the verdict," and that the charge was sound.

⁴⁶⁸ Four cases are cited as precedents for the proposition that a trespasser is entitled to demand from a land owner ordinary care in the use, condition, and maintenance of structures upon his premises. The first was *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29. In that case it was held that a child who, seeing a horse and cart unfastened in the street, got into the cart and was injured, could maintain an action against the owner. The case seems to have gone off upon the questions of negligence and contributory negligence, and, no question of trespass being discussed, the inference is perhaps a proper one that it was found by the jury that the owner was negligent in leaving his horse loose in the public street, and that the child had shown as much prudence as could be expected of him. Not only was there apparently no consideration of this question, but later English cases are in conflict with that case, if it necessarily involved it. In *Mangan v. Atterton*, L. R. 1 Exch. 239, the defendant exposed for sale a machine in a public place, which might be set in motion by a passerby. A boy four years old, by direction of his brother, seven years old, placed his fingers in the machine while another boy was turning the handle which moved it, and his fingers were crushed. Bramwell, J., said the action could not be maintained, and added: "Suppose the machine was of delicate construction, and was injured by the boy; would he not be a trespasser? If so, it is impossible to hold the defendant." In *Hughes v. Macfie*, 2 Hurl. & C. 744, a cellar grating was left standing against a wall in a street. A child playing with it was injured by its falling upon him. The court said that he

could not recover, "because he was voluntarily meddling, for no lawful purpose, with that which, if left alone, would not have hurt him. His being of tender years makes no difference." It is noticeable that even the Lynch case did not involve a trespass upon defendant's close, though it did perhaps involve a trespass to personal property.

The next case cited as authority in *Railroad Co. v. Stout*, 17 Wall. 657, is *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 469 261. There a child was injured by the fall of a gate on the land of the defendant on or near the line of a private alley leading from a public highway back to several dwellings, in one of which the plaintiff lived, and in which alley it had a right to be. The court refused to consider the question, and intimated that it made no difference because the plaintiff was not faultless; citing *Lynch v. Nurdin*. In *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591, 68 Am. Dec. 413, a heavy train of cars coming around a curve killed a child less than three years old, playing on the track. The court followed the case of *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261. The last case cited was *Bird v. Holbrook*, 4 Bing. 628. This was an action brought by a trespasser who was shot by a spring-gun set for the purpose, and is clearly not in point. There was a wanton, intentional act, intended to punish trespassing with death, meriting punishment as a attempt at homicide. It is chiefly valuable in this connection as showing the difficulty found in the attempt to support *Railroad Co. v. Stout*, 17 Wall. 657, by precedents.

The enunciation by the highest tribunal in the country of the rule that a land owner owes a duty of care toward a trespasser was sure to be followed by other courts. Among the earliest of these is *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393. This was a turntable case, and the trespassing child seven years of age. The court there discovers a distinction between a voluntary trespass and one by a person without judgment, who is allured upon premises by his natural inclination, and meddles with things whose uses and dangers he is unable to comprehend. It says: "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." Therefore, this was an invitation, and the child licensed. Having by this reasoning found the child lawfully on the premises, it proceeds to treat the turntable as a trap, and compares it with a case when one sets traps baited with tainted meat, to allure his

neighbors' dogs, which he intends to catch, or sets a spring gun, with the formed design of taking a trespasser's life. ⁴⁷⁰

This case was followed by another case in the same court: *O'Malley v. St. Paul etc. Ry. Co.*, 43 Minn. 289, 45 N. W. 440. This was also a turntable case, and the child six years of age.

In 1881 the supreme court of Nebraska approved the case of *Railroad Co. v. Stout*, 17 Wall. 657, although it reversed the case before it, and, as was done in the *Stout* case, recognized the fact that the cases were not harmonious: *Atchison etc. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50.

In Kansas the doctrine was applied in a case of a turntable located in the midst of an open prairie, and a boy twelve years of age. In discussing the tendencies of boys, the court said: "Everybody knows that, by nature and by instinct, boys love to ride, and love to move by other means than their own locomotion. They will cling to the hind ends of moving wagons, ride upon swings and swinging gates, slide upon cellar doors and the rails of staircases, pull sleds up hill in order to ride down, etc. . . . Now, everybody, knowing the nature and the instincts common to all boys, must act accordingly. No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. . . . It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show. But see, particularly, the cases of *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393"; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203.

Here we have the doctrine of the Turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawnmower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the the ground or leaning against a fence; a bed of mortar prepared for use in his ⁴⁷¹ new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or cow with calf—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through

which the accumulations of the stable are thrown, be kept locked and fastened, lest twelve year old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grind-stone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel-pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish-pond, and must he guard ravines and precipices upon his land? Such is the evolution of the law, less than thirty years after the decision of *Railroad Co. v. Stout*, 17 Wall. 657, when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon. Well might the court of appeals of New York say in *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555: "We are not now called upon to express an opinion as to the soundness of these decisions in such a case, and, while we are not prepared to uphold them, it is enough to say that the facts are by no means analogous."

In addition to the cases discussed, the following recognize the rule laid down in *Railroad Co. v. Stout*, 17 Wall. 657, attempting to justify their adherence to it in the particular cases by one or another reason, which we think it unnecessary to further allude to: *Nagel v. Missouri Pac. Ry. Co.* (1882), 75 Mo. 653, 42 Am. Rep. 418; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666 (this ⁴⁷² case cites *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, as supporting its doctrine; but in that case the child was not a trespasser on the land, whatever may be said of his meddling with the explosives; of this we will have more to say); *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Westerfield v. Levis*, 43 La. Ann. 63, 9 South. 52; *Fort Worth etc. R. R. Co. v. Robertson* (Tex.), 16 S. W. 1093; *Ilwaco R. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335. It is a significant fact that these are all, with possibly one or two exceptions, railway cases; and it has been suggested by a text-writer (2 Wood on Railway Law, 1292), as a reason why railway companies should be held liable in these cases, that they do not hold their property by

precisely the same tenure as an individual does, that they are quasi public corporations, and that such trespasses are common and frequent upon railroads. But this is a suggestion rather than an authority, and does not purport to be more. Certainly the cases of *Railroad Co. v. Stout*, 17 Wall. 657, and *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261, which are the leading cases, do not rest upon or recognize any such distinction or reason.

These two cases, to which can be traced the origin of this doctrine, have not gone unchallenged. In Kansas it was held that the attempt to give a trespasser such a right upon the land of another which could affect the latter in the management of his property would be unconstitutional, as tending to disturb vested rights: *Caulkins v. Mathews*, 5 Kan. 191. In *Deane v. Clayton*, 7 Taunt. 529, Gibbs, C. J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification, I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of [their] wrongs, that I am bound to regard."

A fine discussion of this subject will be found in the opinion of Hall, J., in the case of *Keffe v. Railway Co.*, 473 2 Cent. L. J. 172, where numerous authorities are cited.

The doctrine of the cases under discussion was denied in a terse opinion in the case of *Lake Shore etc. R. Co. v. Clark*, 41 Ill. App. 343. It was said: "The youth of the deceased might be a matter for consideration upon the question of whether he was negligent, but it adds nothing to the duty of the appellant. It is not under greater obligation to anticipate the presence of children upon its tracks than of adults"; citing *Chicago etc. R. R. Co. v. Roath*, 35 Ill. App. 349.

The case of *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790, lays down the general rule thus: "At the time of his injury, the plaintiff was using the defendant's premises as a playground, without right. The turntable was required in operating the defendant's railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers: *Aldrich v. Wright*, 53 N. H. 404, 16 Am. Rep. 339. Under these circumstances, the defendant owed no duty to the plaintiff, and there can be no negligence or breach of duty

where there is no act or service which the party is bound to perform or fulfill. A land owner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises, and, to recover for an injury happening to him, he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger: *Clark v. City of Manchester*, 62 N. H. 577; *State v. Manchester etc. R. R. Co.*, 52 N. H. 528; *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 614; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377, 30 Am. Rep. 686; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Morgan v. City of Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269; *Gavin v. City of Chicago*, 97 Ill. 66, 474 37 Am. Rep. 99; *Wood v. School District*, 44 Iowa 27; *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684; *Cauley v. Pittsburg etc. Ry. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Mangan v. Atterton*, L. R. 1 Exch. 239. The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it: *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it."

The following is the criticism indulged in of the case of *Railroad Co. v. Stout*, 17 Wall. 657: "We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, and cases following it—that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling; nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted

by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public, and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike": *Nolan v. Railroad Co.*, 53 Conn. 461, 4 Atl. 106."

475 The Massachusetts court has been no less emphatic in its condemnation of the case of *Railroad Co. v. Stout*, 17 Wall. 657. In *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. 283, a turntable accident was involved; also a child of ten years. The roadbed was a common thoroughfare. The court discusses all the early cases favorable to plaintiff's contention, and says that, with the one exception of *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591, 68 Am. Dec. 413, "all come within other rules, or within well-defined exceptions to the general rule that a land owner owes no duty to a trespasser, except that he must not wantonly or intentionally injure him or expose him to injury." It cites with approval *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555, and the New Hampshire case of *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; and to the general proposition which it asserts, viz., that, subject to some exceptions, an owner of land may use it as he sees fit, and, if a trespasser or mere licensee is injured, he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted, it calls attention to the following cases: *Hounsell v. Smyth*, 7 Com. B., N. S., 731, and cases cited; *Clark v. City of Manchester*, 62 N. H. 577; *Klix v. Nieman*, 68 Wis. 211, 60 Am. Rep. 851, 32 N. W. 223; *Gramlich v. Wurst*, 86 Pa. St. 74, 27 Am. Rep. 684; *Cauley v. Pittsburg etc. Ry. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep.

365; *Hargreaves v. Deacon*, 25 Mich. 1. Also *Sweney v. Old Colony etc. R. R. Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Metcalfe v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701, and cases cited; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535, 10 N. E. 255; *Johnson v. Boston etc. R. R. Co.*, 125 Mass. 75; *Wright v. Boston etc. R. R. Co.*, 129 Mass. 440; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston etc. R. R. Co.*, 142 Mass. 296, 7 N. E. 866; *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515, 23 N. E. 231; *McCarty v. Fitchburg R. R. Co.*, 154 Mass. 17, 27 N. E. 773. Most of the cases last cited involved injuries to young children.

⁴⁷⁶ The case of *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615, 39 N. E. 1068, in an opinion by Peckham, J., unqualifiedly condemns the rule of *Railroad Co. v. Stout*, 17 Wall. 657. This also was a turntable case, and the child was five years old. It not only shows the inaccuracy of the rule there asserted, but questions some of the reasons set up by the various courts for following *Railroad Co. v. Stout*, 17 Wall. 657, and shows the misapplication of authorities relied upon to support the doctrine that land owners must guard trespassers with reasonable care and diligence. It is unnecessary to quote from it, for it can as well be read: See, also, *Charlebois v. Gogebic etc. R. R. Co.*, 91 Mich. 59, 51 N. W. 812; *Hargreaves v. Deacon*, 25 Mich. 1; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543, 36 S. W. 659; *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62.

In addition, there are many cases that disregard the rule. Thus it has been held that cars are not dangerous machines, attractive to children, within the rule of the "Turntable cases," and that a railroad company owes no duty to a child trespassing in its yard, to see that he does not jump on its cars, or to fence its yard (*Barney v. Hannibal etc. R. R. Co.*, 126 Mo. 372, 28 S. W. 1069; *Rushenberg v. St. Louis etc. Ry. Co.*, 109 Mo. 112, 19 S. W. 216; *Catlett v. Railway Co.*, 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; *Louisville etc. Ry. Co. v. Hurt*, 11 Ky. Law Rep. 825, 13 S. W. 275; *Chicago etc. Ry. Co. v. Stumps*, 69 Ill. 409); nor to keep its cars in good repair, or the doors shut (*McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515, 23 N. E. 231; *Curley v. Missouri Pac. Ry. Co.*, 98 Mo. 13, 10 S. W. 593); nor to guard them so that such a child cannot be injured by loosening the brakes

(Central Branch etc. R. Co. v. Henigh, 23 Kan. 347, 33 Am. Rep. 167; Haesley v. Winona etc. R. R. Co., 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; Gay v. Essex etc. Ry. Co., 159 Mass. 238, 38 Am. St. Rep. 415, 34 N. E. 186; Jakoboski v. Grand Rapids etc. R. R. Co., 106 ⁴⁷⁷ Mich. 440, 64 N. W. 461; O'Connor v. Illinois Cent. R. R. Co., 44 Ia. Ann. 339, 10 South. 678); nor in leaving a handcar near the track (Robinson v. Oregon etc. Ry. Co., 7 Utah. 493, 27 Pac. 689); nor to keep a lookout for trespassing children (Morrissey v. Eastern R. R. Co., 126 Mass. 377, 30 Am. Rep. 686; Wright v. Boston etc. R. R. Co., 142 Mass. 296, 7 N. E. 866; Cleveland etc. R. Co. v. Adair, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; Woodruff v. Northern Pac. R. R. Co., 47 Fed. 689; Chrystal v. Troy etc. R. R. Co., 105 N. Y. 164, 11 N. E. 380; Masser v. Chicago etc. Railway Co., 68 Iowa, 602, 27 N. W. 776; Central R. R. etc. Co. v. Rylee, 87 Ga. 491, 13 S. E. 584; Mitchell v. Philadelphia etc. R. R. Co., 132 Pa. St. 226, 19 Atl. 28; McMullen v. Pennsylvania R. R. Co., 132 Pa. St. 107, 19 Am. St. Rep. 591, 19 Atl. 27; McDermott v. Kentucky Cent. R. R. Co., 93 Ky. 408, 20 S. W. 380; Louisville etc. R. R. Co. v. Williams, 69 Miss. 631, 12 South. 957; Williams v. Kansas City etc. R. R. Co., 96 Mo. 275, 9 S. W. 573).

It remains to discuss our own cases cited in support of plaintiff's contention. The case of Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257, was a case where a young person exploded a dynamite cap which he found on defendant's premises under a shed. In discussing the case, the court alluded to Hargreaves v. Deacon, 25 Mich. 1, where it was unqualifiedly held that "owners of private property are not responsible for injuries caused by leaving a dangerous place thereon, but not immediately adjoining the highway, unguarded, where the person injured was not on the premises by permission, or on business or other lawful occasion, and had no right to be there," and said: "The children, it is said, were trespassers; and, even if it can be said that they were licensed to go where they did, the result must be the same," etc. "This is the point on which the case must turn." The court then proceeded to show that the children were rightfully there by invitation, and that some caution was required in such a case. Clearly, this does not adopt the rule of Railroad Co. v. Stout, 17 Wall. 657. In the case of Baker v. ⁴⁷⁸ Flint etc. R. R. Co., 68 Mich. 90, 35 N. W. 836, the boy was hurt on a public highway crossing by a train. There was no claim that he was

a trespasser, or that he was not rightfully there: *McCahill v. Detroit City Ry. Co.*, 96 Mich. 156, 55 N. W. 668, was a street-car case, where a trespassing boy was driven from a car in motion, and it was clearly a wanton act.

That a land owner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed, rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained to-day by the great weight of authority. It is contended by some law-writers, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Atterton*, L. R. 1 Exch. 239, that a four year old boy was a trespasser, under the circumstances of that case; and there are numerous cases cited in this opinion where liability is denied upon that, and no other, ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Railroad Co. v. Stout*, 17 Wall. 657; but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen. Others have asserted different reasons for following it. One gives us to understand that a child is licensed to go wherever he can find that which attracts him; a Texas court has held that children of tender years cannot be trespassers; while other authorities are content to rest their approbation of ⁴⁷⁹ and adherence to the alleged rule upon the inhumanity of the doctrine that a land owner must not be held responsible for injuries suffered by trespassing children, when by ordinary thoughtfulness and care he could have anticipated and prevented it, and the generic term "attractive nuisances" is applied to the great variety of things which may naturally be expected to allure young children upon private premises. The term "attractive nuisance," as applied, is a new one in the books, and the plausible application of the well-known principle that one must so occupy his own as not to do harm to the rights of others should not be

construed to so restrict the use of private lands as to make it necessary to guard and protect trespassers. A man's home has always been considered his castle—a domain where, secure from intrusion, he might lawfully do as he would, so long as he did not interfere with the legal rights of others. It has been his duty to guard those licensed to enter, but beyond that he has not been required to go. In our anxiety to prevent personal injuries, we should not go so far as to overturn private rights.

Admittedly, the duty of incessant watchfulness and care of one's own premises is limited to young children. It does not extend to an adult. Why should it extend to children, upon whose parents both nature and the law impose the duty of care and watchfulness? When, by reason of a parental neglect of duty, a trespassing child is injured, it might be treated as a casualty, or the neglectful guardian might be liable; but there is much reason, if not wisdom, in the common-law rule that the person trespassed upon should not be liable to respond in damages, instead of, as in other cases, having a right of action against the trespasser. But however Draconic the common-law rule may be considered, it is the province of the courts to enforce it until changed by the legislature. No one questions the power or the propriety of the regulation of the use of railway turntables and other appliances of a dangerous nature. The legislature can do this, and leave untouched ⁴⁸⁰ the common rights of the ordinary landed proprietor. The courts cannot. The rule laid down in *Railroad Co. v. Stout*, 17 Wall. 657, must be a general one, applicable to everyone; and aside from the impropriety of judicial legislation, a wise public policy should forbid such a sweeping innovation by judicial main strength.

In innumerable cases the courts have applied, and continue to apply, the general rule that a land owner need not protect a trespasser, every case being an assertion of the principle which is disregarded in the cases relied upon by the plaintiff. We have cited a few of them—enough, we think, to show that the great weight of authority does not sustain the principle of the Turntable cases. While some of the courts have followed the rule of *Railroad Co. v. Stout*, 17 Wall. 657, both the courts and profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way analogous. They speak of the cases generically, as the "Turntable cases," and treat such cases as exceptional. We are of the opinion that they are exceptional, and

that they are not based upon principle, but contravene one of the old and well-established rules of the law; and we therefore decline to recognize them as authority, preferring to adhere to the better doctrine of the other cases cited. The defendant owed no duty to these children, who were trespassers.

Counsel invoke a further rule, or alleged rule, viz., that the plaintiff went into a place of danger lawfully to rescue her sister, and therefore was rightfully there and entitled to protection. The defendant had a right to rely upon his right to privacy, and to believe that his premises would only be invaded by those whom he should choose to invite and warn against the dangers of the place. Was he, then, bound to suppose that somebody might trespass, and to have some one on hand to warn and protect some possible rescuer of an imaginary trespasser? We think not.

⁴⁸¹ The question discussed disposes of the case, and other points need not be alluded to.

The judgment is affirmed.

Long and Grant, JJ., concurred with Hooker, J.

Chief Justice Moore and Chief Justice Montgomery dissented in an opinion, written by the latter, in which he reiterated and approved the principle of the "Turntable cases," and claimed that they had been adopted by the early decisions in Michigan; citing *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Keating v. Railroad Co.*, 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346. He claimed that the case of *Railroad Co. v. Stout*, 17 Wall. 657, had been approved, and its principle applied in *Keefe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. Railway Co.*, 43 Minn. 289, 45 N. W. 440; *Harriman v. Railway Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Schmidt v. Distilling Co.*, 90 Mo. 293, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Osage City v. Larkin*, 40 Kan. 206, 10 Am. St. Rep. 186, 19 Pac. 658; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Achison etc. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Evansich v. G. C. etc. Ry. Co.*, 57 Tex. 133, 44 Am. Rep. 586; *Whirley v. Whiteman*, 1 Head, 610; *Illwaco R. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; *Ferguson v. Railway*, 77 Ga. 102; *Bridger v. Asheville etc. Co.*, 25 S. C. 133; *City of Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. W. 484; *Indianapolis etc. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; *Hydraulic Works v. Orr*, 83 Pa. St. 333; *Gramlich v. Wurst*, 86 Pa. St. 79, 27 Am. Rep. 684; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. Rep. 619.

The Owner of Private Grounds is under no obligation, in the absence of wanton or willful negligence, to keep them in a safe condition for the benefit of trespassers, idlers, intruders, bare licensees, or others, whether infants or adults, who come upon them, not by invitation, express or implied, but for their own purposes, to gratify their curiosity, or for pleasure: *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, and cases cited in the cross-reference note thereto. See, too, *Schauf v. City of Paducah*, 106 Ky. 229, 90 Am. St. Rep. 220, 50 S. W. 42. It has been held that the owner of dangerous machinery in operation in the usual course of business is under no obligation to protect an infant trespasser from injury therefrom: *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809. See the discussion of this question in the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416-421.

Attempt to Save Life.—The law has so high a regard for human life that it will not impute negligence to an effort to save it, unless made under such circumstances as to constitute rashness: *Corbin v. Philadelphia*, 195 Pa. St. 461, 78 Am. St. Rep. 825, 45 Atl. 1070.

GRIFFIN v. JACKSON LIGHT AND POWER COMPANY.

[128 Mich. 653, 87 N. W. 888.]

LETTOR OF CHATTELS—Liability to Third Parties.—One who lets property for use, like one who sells it, is not responsible to third parties injured by reason of a defect in the property let or sold. (p. 497.)

LETTOR of Dangerous Articles or Substances—Liability for Injuries to Third Persons by.—If one is under any circumstances answerable to third persons injured by a dangerous article or substance let by him to another, it can only be when there is no intervening human agency which might have prevented the injury. (p. 498.)

A LETTOR of Electrical Appliances is not Liable to a third person injured on the premises where such appliances are used by coming into contact with a wire charged with electricity, if the lettor to whom such appliances were furnished knew of the condition of the wire, and of the necessity for taking precautions to avoid harm to persons who might come into contact with it. (p. 498.)

Action for personal injuries. Judgment for the plaintiff, and the defendant brought error.

Wilson & Cobb, for the appellant.

Charles A. Blair and Richard Price, for the appellee.

⁶⁵³ MONTGOMERY, C. J. The plaintiff brings this action to recover for a negligent injury. The facts, as they ⁶⁵⁴ appear by the testimony, are that the plaintiff was in the employ

of the Schlitz Brewing Company, engaged in delivering beer to its customers. One Wright Calkins was a customer of the brewing company. On his premises, and in the cellarway through which plaintiff passed in delivering the beer, was an electric light, attached to a movable wire, supplied with a brass or metal handle or hanger, by which it was hung upon a nail in the cellarway. The wire connecting therewith passed through a hole in the lower end of the handle, thence to the carbon film in the bulb. It was claimed that it was necessary in using the light, and customary, to take hold of the handle or hanger. The breach of duty alleged is that the defendant failed to insulate the wire and handle to the fixture properly. It appears by the testimony of Calkins that the handle had formerly had a kind of cement wrapper on, but, in carrying it through the cellar, it would get loose and drop off, and that it was off at the time of the accident; that some two or three weeks before the accident an agent of the defendant put in a new wire, but did not put any cement or wrapping on at that time; that the agent of the defendant was notified that the wrapper to the handle was off, and that he (Calkins) wanted a new one put on, and that the agent promised to fix it, but that it never was fixed prior to the accident. Plaintiff recovered a judgment for injuries sustained, and the defendant brings error.

The principal contention of defendant is that, upon this state of facts, it does not appear that there was any such privity between the plaintiff and the defendant as entitles the plaintiff to recover for the defendant's neglect; that whatever duty the defendant owed it owed to Calkins; and that third parties injured by reason of this neglect of duty are not entitled to recover against the defendant. There was evidence tending to show that the defendant was the owner of this fixture, but this does not determine the question of liability. In the leading case of *Winterbottom v. Wright*, 10 Mees. & W. 109, the defendant ⁶⁵⁵ was the owner of the mail coach supplied, and it was also his duty to keep it in repair; and it may be stated as a general rule that one who lets property for use, like one who sells it, is not responsible to third parties injured by reason of a defect in the article or property let or sold: See *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Fowles v. Briggs*, 116 Mich. 428, 72 Am. St. Rep. 539, 74 N. W. 1046, and cases cited. In *Fowles v. Briggs*, 116 Mich. 428, 72 Am.

St. Rep. 539, 74 N. W. 1046, it was said that the only apparent exceptions to this rule were where the fault consisted of defendant failing to keep his premises in a suitable and safe condition, or where the defendant had reserved the right to direct the manner of the work or undertaken to supply the instrumentalities, or where the shipper of a dangerous substance, the character of which was not made known to the carrier, had been held liable. If it be suggested that this case comes within the latter class of cases—namely, where the defendant is dealing with a dangerous substance—the limitation of the rule, as we understand it, is that there shall be no intervening human agency which might have arrested the injury or furnished protection. This is well illustrated in the case of *Carter v. Towne*, 103 Mass. 507, where gunpowder was sold to a boy eight years of age, and it was, of course, conceded that the defendant was responsible for the injury likely to occur from the explosion of this dangerous substance. But it appeared that, after the sale, the boy had carried home the gunpowder, and put it in the custody of his parents, and that a part of it had been fired off by him, with their permission, before the explosion occurred by which he was injured. It was held that the sale of the gunpowder to the boy was not, therefore, a direct, proximate, or efficient cause of the injury.

So, in the present case, it appears that Calkins knew of the necessity of a protection for the lamp, and, whatever may be said of the failure of duty on the part of defendant to him, he saw fit to make use of it in its imperfect condition, and this must be held to be the intervention of another ⁶⁵⁶ agency between the defendant's neglect and the plaintiff's injury. Of the cases cited by plaintiff's counsel, none of them militate against the rule which we think must govern the present case: See *Reagan v. Boston Electric Light Co.*, 167 Mass. 406, 45 N. E. 743; *Atlanta etc. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377; *Ahern v. Oregon Telephone etc. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549. In each of these cases the fault was a fault of the defendant's system, wholly under its own control, and with which no person other than the defendant had authority to interfere in any manner whatever. But such is not the present case.

Whether we may deem electricity, in the voltage used by the defendant, a dangerous substance, within the meaning of the rule that one transmitting such dangerous substance shall

be held liable, where there is no intervening person charged with any duty connected with it, who has knowledge of its dangerous character, in a case presenting facts involving that principle, we need not here decide, as we think that, upon the ground stated, the verdict should have been directed for the defendant.

The judgment will be reversed and a new trial ordered.

The other justices concurred.

THE LIABILITY TO THIRD PERSONS OF LESSORS OF REAL OR PERSONAL PROPERTY.*

I. Scope of Note.

II. Liability of Lessors of Real Property.

a. Not Responsible as Principal for Acts of Lessee.

b. For Injuries from Defective or Noxious Premises.

1. General Rule.

2. Arising from Failure to Repair During Lease.

A. General Rule.

B. Where Lessor Covenants to Repair.

(1) View that Lessor is Liable.

(2) Contrary View.

(3) Criticism of Opposing Views.

(4) Reservation by Lessor of Right to Repair.

(5) Covenant with Original Lessor by Tenant Who Subleases, that Tenant Will Repair.

(6) Necessity of Actual Notice of Defect.

C. Where Lessor While Making Repairs Creates Dangerous Condition.

3. Classification of Third Persons with Respect to Lessor's Liability to Them.

4. To Licensees, Guests, etc., of Tenant.

A. General Rule.

B. Doctrine of Caveat Emptor.

C. Where Lessor Conceals Defect.

*REFERENCES TO MONOGRAPHIC NOTES.

Liability of landlord and tenant respectively for nuisances or injuries from failure to repair: 50 Am. Dec. 776-783.

Covenants to repair: 95 Am. Dec. 118-125.

Of the liability of a property owner for a nuisance which he did not create: 86 Am. St. Rep. 508-523.

Liability of lessor railway corporations to persons other than the lessee: 48 Am. St. Rep. 147-156.

Of the liability of the landlord letting premises in a defective and dangerous condition: 66 Am. St. Rep. 785-789.

What justifies the tenant in abandoning leased premises: 48 Am. St. Rep. 476-492.

D. Where Lessor Negligently Leases Defective Premises.

- (1) View that Lessor is not Liable.
- (2) View that Lessor is Liable—General Rule.
- (3) Where Intended Use is Public—Wharves, Piers, etc.
- (4) Public Halls, etc.
- (5) Public Nature of Intended Use—Effect of.
- (6) Where Intended Use is not Public.
- (7) Covenant by Lessee to Repair.
- (8) Inconsistency of View that Lessor is Liable with Doctrine of Caveat Emptor.

E. Where Lessee Creates the Nuisance or Danger.**F. Improper Use of Premises by Lessee.****G. Where Lessor Retains Control of a Portion of Premises.**

- (1) In General.
- (2) Common Passageways, etc.
- (3) Stairways Used in Common by Several Tenants.
- (4) Other Instances.
- (5) Actual Notice of Defect Unnecessary.

5. To Strangers.**A. In General.****B. For Nuisance Created by Lessee.****C. For Misuse of Premises by Lessee.****D. For what Injuries Liable—In General.****E. Where Nuisance, etc., Exists at Time of Lease.****F. Where Ordinary Use of Premises Will Create a Nuisance.****G. Where Premises are Leased for a Noxious Purpose.****H. Where Lessor Retains Control of Portion of the Premises.****I. Where Lessor Assents to or Licenses Act Causing the Injury.****J. Renewal of Lease Equivalent to Original Letting.**

- (1) In General.
- (2) Where Tenancy is from Month to Month, Year to Year, etc.

K. Liability of One Who Acquires Property Subject to a Lease, and With a Nuisance Upon It.

L. Actual Knowledge of Defect Existing at Time of Lease not Essential.

M. Covenant by Lessee to Repair.

N. Instances of Liability to Owners or Occupants of Adjoining Premises.

- (1) Cesspools, Privy Vaults, etc.
- (2) Barns, Stables, etc.
- (3) Defective Plumbing, etc.
- (4) Interference With Water Rights.

O. Instances of Liability to Persons on Highways.

- (1) Defective Awnings.
- (2) Falling Walls, Chimneys, etc.
- (3) Fall of Snow and Ice from Roof.
- (4) Ice on Sidewalk.
- (5) Areas, Cellarways, etc., in Sidewalk.
- (6) Coal Vaults in Sidewalk.
 - (a) General Principles.
 - (b) Necessity and Effect of License from Municipality to Construct.
 - (c) Where Under Control of Lessor.
- (7) Immaterial Whether Defect is on or Adjacent to Highway.

P. Statutory Provisions.

III. Liability of Bailor, Lessor, etc., of Personal Property.

a. For Acts of Lessee.

b. Defects in Appliances (Chattels) Bailed, Leased, etc.

1. Basis of Liability.

A. In General.

B. No Privity of Contract.

- (1) In General.
- (2) Where Plaintiff is Servant of Lessee.
- (3) No Recovery for Breach of Contract.

C. General Duty of Care not to Injure Others.

D. Implied Invitation to Use Appliances.

E. "Imminently Dangerous" Nature of Appliance.

2. Failure to Repair During Term of Letting.

3. Where Lessor Does not Select Appliances Furnished.

4. Improper Use of Appliances by Lessee.

5. When Negligence of Lessor is the Proximate Cause of the Injury.

6. Instances.

A. Staging, Scaffolds, etc.

B. Hoisting Apparatus—Ship's Tackle, etc.**C. Miscellaneous.****I. Scope of Note.**

The liability of a lessor railway corporation has already been discussed in the monographic note to *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147-156, and will not, therefore, be here considered. Apart from this, however, the liability of a lessor of real and personal property to third persons injured by the acts of the lessee or from defects in or the noxious effects of the property leased will be treated.

II. Liability of Lessors of Real Property.

a. **Not Responsible as Principal for Acts of Lessee.**—The relation of landlord and tenant, in itself, involves no idea of representation or of agency. It is a relation existing between two independent contracting parties, and the landlord is not responsible to third persons for the torts or criminal acts of his tenant. "Respondeat superior is inapplicable to an owner of land for acts of negligence, in a business not conducted by him, and for his account": *Offerman v. Starr*, 2 Pa. St. 394, 44 Am. Dec. 211. See, also, *Cruselle v. Pugh*, 67 Ga. 430, 44 Am. Rep. 724. A lessor is not, for instance, liable to the injured party for the act of his lessee in enticing away the servant of another: *Duncan v. Anderson*, 56 Ga. 398; nor is he responsible for the obstruction of a public highway by his tenant: *Commonwealth v. Switzer*, 134 Pa. St. 383, 19 Atl. 681. On the same principle, if the tenant, while burning stubble or timber, negligently permits the flames to escape to the land of an adjoining owner, the lessor cannot be made responsible therefor: *Todd v. Collins*, 6 N. J. L. 127; *Ferguson v. Hubbell*, 26 Hun, 250; unless he has, in some way, participated in the negligent act: *Meadows v. Truesdell* (Tex. Civ. App.), 56 S. W. 932; in which case liability is the result of his participation, and not of his status as lessor. The instances in which it is most frequently sought to hold a landlord responsible for the tortious acts of his tenant are those in which the acts or omissions complained of, in some way relate to the management of the property leased. These we shall hereafter consider.

b. For Injuries from Defective or Noxious Premises.

1. **General Rule.**—The general rule governing the liability of a lessor of real property to third persons injured thereby is that, *prima facie*, the breach of duty (and, therefore, the liability), is that of the occupier, and not of the landlord. The premises are in the exclusive possession of the tenant, a possession so exclusive that, in the absence of stipulation, the landlord himself cannot enter. If the premises have become defective and dangerous through want of repair, the duty to keep them in repair being *prima facie* with the tenant, he and not the landlord, will be *prima facie* liable for the injury resulting. If the injury arises from a nuisance maintained upon the premises, the maintenance of it is presumptively the act of the lessee alone,

and, in the absence of evidence connecting the lessor therewith, he will not be liable. It is, therefore, a general rule, subject to qualifications to be hereafter discussed, that the landlord is not responsible to third persons for injuries to them resulting from the condition or use of the premises leased; and, in order to render him liable, more must be shown than that the premises on which or from which the injury arose were by him leased to another: *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346; *Edgar v. Wallace*, 106 Ga. 454, 32 S. E. 582; *Gridley v. City of Bloomington*, 68 Ill. 47; *Tomle v. Hamilton*, 129 Ill. 379, 21 N. E. 800; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439; *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583; *De Farr v. Ferd. Heim Brewing Co.*, 62 Kan. 188, 61 Pac. 689; *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65; *City of Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Kirby v. Boylston Mkt. Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Shipley v. 50 Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Szathmary v. Adams*, 166 Mass. 145, 44 N. E. 124; *Samuelson v. Cleveland & Co.*, 49 Mich. 164, 43 Am. Rep. 456, 13 N. W. 499; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Maucus v. Kansas City*, 74 Mo. App. 138; *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 373; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Turnier v. Lathers*, 59 Hun, 623, 13 N. Y. Supp. 500; *Kaston v. Newhouse*, 4 E. D. Smith, 20; *Batterman v. Finn*, 32 How. Pr. 501; *Covey v. Mann*, 14 How. Pr. 163; *Shindlebeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Fleischner v. Citizens' Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Marshall v. Heard*, 59 Tex. 266; *Nelson v. Liverpool Brewing Co.*, 46 L. J. Com. P. 675, 2 C. P. D. 311, 25 Week. Rep. 877.

2. Arising from Failure to Repair During Lease.

A. General Rule.—The most frequent application of this general rule is to cases in which premises in good condition at the time of the demise are permitted to fall into disrepair during the lease. In the absence of stipulation, both as between the lessor and lessee and as between these and third persons, the duty to repair rests upon the lessee. As already suggested, unless provision is made in the contract of letting, a landlord has no right to enter upon premises leased by him to another for the purposes of investigation as to the need of repairs or to make such repairs as are needed. In the absence of such right there can be no correlative duty, and accordingly a lessor is not, as a general rule, responsible for injuries to third persons which arise from the failure of the lessee to keep the premises demised in good repair: See cases cited in preceding paragraph, and in addition the following: *Wilson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Deller v. Hafferberth*, 127 Ind. 414, 26 N. E. 889; *City of Boston v. Gray*, 144 Mass. 53, 10 N. E. 509; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E.

1086; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803; *Deutsch v. Abeles*, 15 Mo. App. 398; *O'Brien v. Greenbaum*, 52 Hun. 610, 4 N. Y. Supp. 852; *Fellows v. Gilhuber*, 82 Wis. 639, 52 N. W. 307.

B. Where Lessor Covenants to Repair.

(1) **View that Lessor is Liable.**—To this general rule that for injuries to third persons resulting from the failure to repair the leased premises, the lessee and not the lessor is liable, there is said to be an exception where the landlord has bound himself by contract to make necessary repairs. "The rule is, that the occupier, and not the landlord, is bound as between himself and the public, so far to keep buildings in repair that they may be safe for the public; but if the landlord is bound by express agreement with the tenant to repair, the party injured by a defect or want of repair may have his action against the landlord in the first instance to avoid circuitry of action": *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735. This qualification of the general rule is usually made a part of the statement of the latter, and is ordinarily laid down as one of the two main exceptions to the rule that the lessor is not liable. "We think that there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable: First, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner": *Nelson v. Liverpool Brewery Co.*, 46 L. J. Com. P. 675, 2 C. P. D. 311, 25 Week. Rep. 877.

In many, if not in most, of the cases in which this qualification is stated, it is a dictum, no contract binding the lessor to repair being present in the case. In some, however, this is not the case, and in all it is regarded as a well-settled qualification of the general rule, based upon the theory of an avoidance of circuitry of action. If recovery were had against the lessee, he in turn might sue the lessor for the breach of his contract to repair, and therefore, according to this view, to deny recovery by the third person against the landlord in the first instance, would be to compel the bringing of two suits where one might be made to accomplish the same result: See for cases recognizing this qualification of the general rule and permitting recovery by a third person against the lessor, whenever the defective condition of the premises which caused the injury is the result of the breach of the contract between the landlord and tenant binding the former to repair: *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Gridley v. City of Bloomington*, 68 Ill. 47; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am.

St. Rep. 327, 61 N. E. 439; *Reichenbacher v. Palmeyer*, 8 Ill. App. 217; *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583; *Tomle v. Hamilton*, 28 Ill. App. 142; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *City of Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086; *Maneuso v. Kansas City*, 74 Mo. App. 138; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; *White v. Sprague*, 9 N. Y. St. Rep. 220; *Benson v. Suarez*, 43 Barb. 408, 28 How. Pr. 511, 19 Abb. Pr. 61; *Fleischner v. Citizens' Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Perez v. Raband*, 76 Tex. 191, 13 S. W. 177; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451; *Moore v. Steljes*, 69 Fed. 518; *Nelson v. Liverpool Brewery Co.*, 46 L. J. Com. P. 675, 2 C. P. D. 311, 25 Week. Rep. 877; *Payne v. Rogers*, 2 H. Black. 350. See, also, *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703, followed in *Boyce v. Snow*, 187 Ill. 181, 58 N. E. 403.

In *Payne v. Rogers*, 2 H. Black. 350, this theory that circuity of action is to be avoided by rendering the lessor liable to injured third persons in the first instance, where he has covenanted with the lessee to repair, is carried to the extent of holding that the lessee is for the same reason relieved of liability. While a consideration of the liability of the lessee to third persons is not within the scope of this note, it may be well to note that the case has been criticised in the English courts, and is evidently erroneous: See Lord Denman in *Russell v. Shenton*, 3 Ad. & E., N. S., 449. See, also, *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767; *Odell v. Solomon*, 50 N. Y. Super. Ct. (18 Jones & S.) 119; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767.

(2) **Contrary View.**—In spite of the fact that in the cases above cited the qualification under consideration is laid down as apparently well settled and universally recognized, such is by no means the case. In a number of well-considered cases any such qualification of the general rule is denied. These cases proceed upon the fundamental principle that one who is not a party to a contract cannot (except in peculiar cases none of which are here present) bring an action thereon to recover for its breach. Thus in *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767, it is said: "If the lessor engages with the lessee to keep the premises in repair, a breach of the engagement gives a right of action only to the lessee. . . . The fact that Cheadle had agreed with the lessees to construct the fixtures in a manner safe and proper for the sale of drygoods and groceries, and the fact of his failure to perform his contract, are not elements in the plaintiff's right to recover. The plaintiff had no interest in that contract or in the breach of it." To the same effect see *Quay v. Lucas*, 25 Mo. App. 4; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767; *Willeox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, 45 S. W. 781; *McGinn v. French*, 107 Wis. 54, 82 N. W. 724. See, also, *Consolidated Hand-Method Lasting*

Mach. Co. v. Bradley, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464. In New York the various cases contain expressions which are not in complete harmony, but the result of the authorities in that state is that the mere breach of a contract between a lessor and lessee, by which the former binds himself to keep the demised premises in repairs, gives no right of action to third persons injured by a defect in the premises, unless perhaps in the case where, by reason of his failure to repair, the premises become a nuisance. Exactly what is meant by this qualification is not clear, but the position of the New York courts on the main question is undoubted, and denies to a stranger to a contract of letting a right of action against the landlord based upon a stipulation in the contract by which he is bound as between himself and the lessee to keep the premises in repair: *Steiger v. Vansiclen*, 132 N. Y. 499, 28 Am. St. Rep. 594, 30 N. E. 987; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *Dood v. Rothschild*, 31 Misc. Rep. 721, 65 N. Y. Supp. 214; *Miller v. Rinaldo*, 21 Misc. Rep. 470, 47 N. Y. Supp. 636; *Folsom v. Parker*, 31 Misc. Rep. 348, 64 N. Y. Supp. 263; *Flynn v. Hatton*, 43 How. Pr. 333.

(3) **Criticism of Opposing Views.**—On principle the view that a contract by the landlord to keep the premises in repair gives no right of action to a stranger to the contract seems preferable. It is in accord with the general principle that one cannot sue on a contract to which he is not a party, and this principle is not in the case under consideration, affected by any objection to circuity of action. To a third person injured by defective premises the liability of the lessee is based upon negligence and the measure of the damages recoverable is compensation for the injury resulting from such negligence. The right of action, on the other hand, arising in favor of the tenant and against the landlord for breach of the latter's agreement to repair is not for negligence, but for breach of contract. "When such agreement has been made, the measure of damages for the breach of the contract is the expense of doing the work which the landlord agreed to do but did not. A contract to repair does not contemplate, as damages for the failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises. . . . Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence": *Schick v. Fleischauer*, 26 App. Div. 210, 49 N. Y. Supp. 962, quoted in *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855. It is evident, therefore, that the doctrine that circuity of action is to be avoided has here no legitimate application. Not only is the nature of the cause of action in favor of an injured third person and against the lessee different from that of the cause of action between the latter and his lessor, but the amounts recoverable in the two actions are different, and to hold the landlord liable in the first instance to the third person is to impose upon him a liability far in excess of that ordinarily resulting from a breach of contract.

(4) **Reservation by Lessor of Right to Repair.**—Even, however, under the doctrine of those cases which permit a recovery against the landlord on the theory of preventing a circuitry of action, the landlord must, in order to be thus liable, have bound himself to repair. A mere reservation of the right to enter and inspect and make such repairs as he may see fit is not the equivalent of a covenant to repair. “It would have been wholly immaterial if these defendants, owners of the pier, had let it without reserving any right to go upon it for repairs, and even if they could not have gone upon it for repairs without being trespassers: Citing *Fish v. Dodge*, 4 Denio, 34, 47 Am. Dec. 254; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. There is no case which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. . . . The whole argument on this point is summed up in the statement that, as there was here no breach by the defendants of any duty due from them to the tenant, the stipulations in the lease do not concern a stranger thereto”: *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. To the same effect, see *City of Boston v. Gray*, 144 Mass. 53, 10 N. E. 509; *Steiger v. Vansielen*, 132 N. Y. 499, 28 Am. St. Rep. 594, 30 N. E. 987.

(5) **Covenant With Original Lessor by Tenant Who Subleases that Tenant Will Repair.**—So, also, while a lessee of premises, who in turn sublets them to another, stands in the position of an owner who has leased (*Stewart v. Putnam*, 127 Mass. 403; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; *Irvin v. Wood*, 27 N. Y. Super. Ct. (4 Rob.) 138), a covenant by such lessee to his landlord that he (the lessee) will keep the premises in repair does not give any right of action to a third person injured by his failure to repair according to his agreement. In such a case the theory that recovery against the lessor in the first place would prevent circuitry of action has no application, since the lessee, who has sublet is responsible on his covenant not to his sublessee, but to his landlord. “As he had made no covenant to repair with his tenant and was not bound to indemnify him, the person injured could not maintain an action against him although he had covenanted with his landlord to repair”: *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193, referring to *Clancey v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391. To the same effect see *Odell v. Solomon*, 99 N. Y. 635, 1 N. E. 408, reversing 50 N. Y. Super. Ct. (18 Jones & S.) 119.

(6) **Necessity of Actual Notice of Defect.**—An agreement by the landlord to repair is not, moreover, an agreement absolutely and without qualification to at all times keep the premises in good condition. He is entitled to notice from the tenant of the need of repairs, and to a reasonable time within which to make them. “The landlord cannot be deemed to have broken his engagement, or to be in default,

unless it appears that he neglected to do the thing promised, after notice, and the lapse of a time sufficient to enable him to repair": *Ploen v. Staff*, 9 Mo. App. 309. And, since a third person injured by defective premises, which the lessor is bound by contract to keep in repair, cannot, under any theory, recover from the lessor, unless the contract of the latter with his tenant is broken, there can be no such recovery unless the lessor is shown to have had notice of the defect which occasioned the injury and a reasonable time for making the repair has elapsed: *Ocean S. S. Co. of Savannah v. Hamilton*, 112 Ga. 901, 38 S. E. 204; *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *McLean v. Fiske Wharf etc. Co.*, 158 Mass. 472, 33 N. E. 499; *Ploen v. Staff*, 9 Mo. App. 309; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193. Where the defect is in a portion of the premises used in common by several tenants, and over which the lessor has retained control, a different rule is applicable. The duty of the landlord to repair and his liability for failure to do so is dependent, in that case, upon no requirement of notice by the tenant: *Olson v. Schultz*, 67 Minn. 494, 64 Am. St. Rep. 437, 70 N. W. 779, and post, II, b, 4, G, (5).

C. Where Lessor, While Making Repairs, Creates Dangerous Condition.—If, while actually engaged in making repairs, the lessor, by himself or his servants, creates a danger on or about the premises, and a third person is injured in consequence, the lessor is of course liable: *Barman v. Spencer (Ind.)*, 49 N. E. 9; *Leslie v. Pounds*, 4 Taunt. 649. The liability in such case is not, however, dependent upon or affected by the fact that the lessor had covenanted to repair, "since that contract but excused the landlord from going upon the premises. His liability is for the affirmative wrong in creating a dangerous condition. The same liability would have arisen if he had been a stranger to the parties and to the premises": *Barman v. Spencer (Ind.)*, 49 N. E. 9. The lessor is not, therefore, liable for the negligence of an independent contractor, who creates a dangerous condition on the premises: *Mahon v. Burns*, 9 Misc. Rep. 223, 29 N. Y. Supp. 682. Nor is he responsible for injuries to adjoining land caused by the negligence of the lessee in making repairs: *Murray v. Richards*, 1 Allen 404, (overflow of water from drain negligently left open for repairs by lessee).

3. Classification of Third Persons with Respect to Lessor's Liability to Them.—Third persons, as respects their rights against the lessor of property for injuries received from the condition or use of such property, are divisible into two classes. Of these the first includes those who are strangers to the landlord and the tenant. Such are travelers upon the highway adjoining the leased property, the owners or occupants of adjoining or neighboring premises, etc. The rights of persons such as these are affected in no way by any assumption of risks. They are upon premises other than those covered

by the lease, or upon a common highway and their right to be there in no way depends upon any contractual relation between the landlord and tenant.

The second class, on the other hand, are persons on the premises by the license of the tenant. Such are the servants, employes, invited guests, licensees, customers, etc., of the tenant. Their right to be upon the premises, if they have any such right, must have arisen from a license or invitation of the person in possession, i. e., the tenant. Unlike those of the first class, their only right upon the premises is such as the tenant has given them expressly or by implication, and depends, therefore, upon the contract of letting between the lessor and the lessee: See, for cases in which this distinction is brought out, *McConnell v. Lemley*, 48 La. Ann. 1433, 55 Am. St. Rep. 319, 20 South. 887; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *Ward v. Fagan*, 28 Mo. App. 116; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Marshall v. Heard*, 59 Tex. 266; *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451.

4. To Licensees, Guests, etc., of Tenant.

A. General Rule.—The point of the distinction is that the duties and liabilities of the landlord to persons of the second class are the same as those owed to the tenant himself. For this purpose they stand in his shoes. Visitors, customers, servants, employes and licensees in general of the tenant are on the premises as guests, etc., of the tenant, and not of the landlord. Whatever rights such invitation or license from the lessee may confer, as against such lessee, as against the lessor it can give no greater rights than the lessee himself has. As between the lessor and such persons the duty to put and maintain the premises in a safe condition is the same as that which the landlord owes to his tenant: *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *Whitmore v. Orono Pulp etc. Co.*, 91 Me. 297, 64 Am. St. Rep. 229, 39 Atl. 1032; *Bawe v. Hunking*, 135 Mass. 380; *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012; *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216; *O'Malley v. 25 Associates*, 178 Mass. 555, 60 N. E. 387; *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; *Gleason v. Boehm*, 58 N. J. L. 475, 34 Atl. 886; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580; *Monteith v. Finkbeiner*, 66 Hun, 633, 21 N. Y. Supp. 288; *O'Brien v. Capwell*, 59 Barb. 497; *O'Sullivan v. Norwood*, 8 N. Y. St. Rep. 388, 14 Daly, 286; *Henkel v. Murr*, 31 Hun, 28; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891.

B. Doctrine of Caveat Emptor.—So far, then, as concerns the liability of a landlord to third persons of this class (i. e., licensees, employes, invited guests, etc., of the tenant) for injuries received from defects on the premises existing at the time of the lease, it is the

same as that of the lessor to the lessee for injuries received by the latter from the same cause. Concerning this latter liability the authorities are, as we shall see (post, II, b, 4, D, (8)), not in entire harmony, but the general rule is conceded that so far as any contractual liability is concerned, the rule of caveat emptor applies. The landlord does not, by making the lease, impliedly warrant that the premises are in a safe condition, or fit for the uses to which the lessor may intend to put them. It is for the lessee to make such examination as is necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired. The rule of caveat emptor applies with as much rigor to contracts of letting as to sales of chattels. The law in this regard has already been discussed in previous notes in this series, and a citation of the cases is here unnecessary: See monographic notes to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 476-481, to *Willcox v. Hines*, 66 Am. St. Rep. 785-789, and to *City of Lowell v. Spaulding*, 50 Am. Dec. 776-783.

In accordance with principles above discussed, the same rule applies whether the injured person be the tenant himself or one who, licensed or invited by the tenant, is lawfully upon the premises. Thus it is held that this rule of caveat emptor applies to a case where the drainage of a house leased by defendant is defective, and a person living with the tenant cannot recover from the landlord for sickness caused by such drainage, in the absence at least of a contract to repair on the part of the defendant, or of a fraudulent concealment of the defect at the time of the lease. "The plaintiff was occupying the defendants' premises by the permission of the tenant, and not by invitation of the landlord, and had the same rights against the landlord as the tenant—those of a lessee against a lessor. . . . A tenant would assume the risks of a dangerous condition of the leased premises, unless there were deceit, special rights created by express contract, or some cause of action that does not appear in this case": *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492. See, also, *Angevine v. Knox Goodrich* (Cal.), 31 Pac. 530. So it has been held that a subtenant has no right of recovery against the first lessor for injuries occasioned by a fall through a hole in a porch, the defect being obvious and open equally to the observation of the lessor and the occupier: *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913. Nor can an employé of the tenant charge the lessor for injuries received by falling from an elevator, merely because the elevator was not tightly inclosed: *Freeman v. Hunnewell*, 163 Mass. 210, 39 N. E. 1012; nor, in the absence of fraud or deceit, is the landlord liable for a defect in an elevator occasioning injury to the guest of the tenant: *Oriental Inv. Co. v. Sline*, 17 Tex. Civ. App. 692, 41 S. W. 130.

This rule that the doctrine of caveat emptor is applicable to a lease, and binds equally the tenant and his privies, has been applied in numerous cases. Under it it has been held that a lessor is not

liable for injuries received by a guest of the tenant from the fall of a defective awning: *Fellows v. Gilhuler*, 82 Wis. 639, 52 N. W. 397; by a customer of the tenant from insecure shelving falling upon such customer: *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; by a guest or member of the family of the tenant from an insufficiently guarded platform: *Donner v. Ogilvie*, 49 Hun, 229, 1 N. Y. Supp. 633; *Ten Broeck v. Wells, Fargo & Co.*, 47 Fed. 690; by a child of a subtenant falling down an incline from which a fence had been removed prior to the letting: *Peterson v. Smart*, 70 Mo. 34; by a licensee, etc., of the lessee falling through a defective grate in an approach to the premises: *Robbins v. Jones*, 15 Com. B., N. S., 221, 33 L. J. Com. P. 1, 10 Jur., N. S., 239, 9 L. T. 523, 12 Week. Rep. 248; or by an unprotected walk forming such an approach: *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; or adjacent to a cellar-way: *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216. And, on the same principle, a landlord has been held not liable to a child visiting his tenant where it was injured by falling through an unprotected skylight, although the landlord had agreed to maintain the roof in safe condition for the tenant to use in drying clothes: *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57. Similarly, in the absence of fraud or deceit, the doctrine of caveat emptor operates to defeat the recovery of one who, while a member of the audience of a leased opera-house, was injured by a fall of the ceiling: *Dyer v. Robinson*, 110 Fed. 99; or of a person who, while attending an exhibition, was injured by the fall of a box into which the lessee had crowded a large number of people: *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659.

Other instances of the application of the same rule are to be found in cases in which a servant, guest, etc., of the tenant has sought to recover from the landlord for injuries sustained from defects, the opportunities for observing which were equally open to lessor and lessee. Where the defect was in machinery on the premises: *Whitmore v. Orono Pulp etc. Co.*, 91 Me. 297, 64 Am. St. Rep. 229, 39 Atl. 1032; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451; in defective boilers: *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438, affirming 14 Abb. Pr., N. S., 263; in revolving shafts left unguarded: *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384, affirming 45 N. Y. Super. Ct. (13 Jones & S.) 273 (see post, 522, 523); a cistern defectively supported: *Perez v. Raband*, 76 Tex. 191, 13 S. W. 177; defective stairway: *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 300 (see, also, *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; and post, II, b, 4, G. (3); a porch defectively constructed: *O'Brien v. Capwell*, 59 Barb. 497—see, also, *Corey v. Mann*, 14 How. Pr. 163; *Flynn v. Hatton*, 43 How. Pr. 333); and a loose top to a mantelpiece: *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. 767. See, also, generally in this connection, *Swalbach v. Shinkle & Co.*, 97 Fed. 483. In all these, and in the cases previ-

ously cited, the general rule was applied that the employ  s, guests, etc., of a tenant, stand in the shoes of the tenant himself, so far as regards the duty of the landlord to them in warranting the safety of the premises, and it is accordingly held that in the absence of fraud or deceit, and where the defects are equally patent to all observers, the lessor is not responsible for injuries from defects in the premises, although they existed at the time of the lease.

C. Where Lessor Conceals Defect.—In most of these cases, however, an exception to the general rule is recognized where the landlord, in leasing the premises, has been guilty of fraud or deceit in concealing defects of which he knew, and which have caused the injury: See monographic note to *Willcox v. Hines*, 66 Am. St. Rep. 787; *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656; *Schwalback v. Shinkle*, 97 Fed. 483; *Dyer v. Robinson*, 110 Fed. 99.

D. Where Lessor Negligently Leases Defective Premises.

(1) **View that Lessor is not Liable.**—Where there is active fraud or concealment, there is but little question of liability. There is, however, no little conflict as to whether actual fraud or concealment is necessary. According to one view, it must be shown that at the time of the lease the landlord had actual knowledge of the defect which occasioned the injury in order to render him liable therefor: See *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Gwinnell v. Eamer*, L. R. 10 Com. P. 658, 32 L. T. 835 (as explained in *Ingeversen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109. See, however, explanation contra in *Borman v. Sandgren*, 37 Ill. App. 160.)

(2) **View that Lessor is Liable—General Rule.**—The weight of authority does not, however, seem to sustain such a rigid restriction of the landlord's liability. Judge Thompson, in *Dyer v. Robinson*, 110 Fed. 99, says: "If the lessors, knowing the defect, conceal it—if they practice a deceit upon the lessees—they are responsible; but some of the authorities hold that in cases of fraud and deceit the fraud and deceit must be active; that there must be a purpose and intention to deceive, to mislead, to misrepresent. I prefer, however, to take the broad ground, which I think the authorities sustain, that in such a case a duty is cast upon the lessors to disclose the defect, and if they fail to do so, they are liable for injurious consequences."

In *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297, which while it is an action by a tenant (and not by a third person) against the landlord, involves the same principles as where a third person of the class now under consideration is the plaintiff, the following language is used in this connection. "It is insisted, however, that in such cases of hidden defects there is no liability in the absence of actual knowledge on the part of the landlord, and fraud and deceit practiced by him. The case of *Hines v. Willcox*, 96 Tenn. 332, 34 S. W. 420, heretofore reported, goes one step further than this, and holds the landlord liable, not only if he has actual knowledge,

but also if by the exercise of reasonable care and diligence he could have such knowledge, and it is only upon this latter proposition that there is any difference of opinion. Hence, it is strenuously insisted that no active duty devolves upon the landlord to ascertain such hidden defects and dangers, and, in the absence of actual knowledge, the landlord will not be liable for any damages. The logic of this position is that a landlord is under no obligation to know anything about the condition of his premises, whether they are dangerous or safe, whether habitable or a nuisance, and so long as he keeps himself ignorant, either intentionally or negligently, he cannot be held liable for any damages resulting from the dangerous condition of the property when leased. But if, by accident or examination, he becomes aware that a secret defect does exist, then he is liable if he failed to disclose it. Under this ruling the landlord is placed in the better condition the more negligent and inattentive he is, and a premium is put upon his ignorance."

Accordingly, it is held in this and a number of other cases that a landlord who lets defective premises is liable to third persons lawfully on the premises, and who sustain injuries from such defects, whenever he knew at the time of the lease, or by the exercise of reasonable diligence might have known, of the defect in question: *Barnum v. Sandgren*, 37 Ill. App. 160; *Metzger v. Schultz*, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159; *Stenberg v. Wilcox*, 96 Tenn. 163, 33 S. W. 917; *Wilcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761, 45 S. W. 781 (also cases there cited and monographic note, 66 Am. St. Rep. 785-789); *Dyer v. Robinson*, 110 Fed. 99. Contra, see *O'Malley v. 25 Associates*, 178 Mass. 555, 60 N. E. 387.

In accordance with this theory it was held, in *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217, that an employé of the tenant might recover from the lessor where he was injured by the fall of a chandelier, negligently hung in the barroom of a hotel, the court conceding that there was no breach of any implied warranty as to the safety of the premises demised, but placing the case upon the principle that the lessor had failed to exercise due care "where it was his duty to use ordinary care out of respect to the rights of others liable to be thereby directly involved": See, also, *Stenberg v. Wilcox*, 96 Tenn. 163, 33 S. W. 917 (defective porch); *Dyer v. Robinson*, 110 Fed. 99 (fall of ceiling in opera-house); *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891 (defective elevator); *Borman v. Sandgren*, 37 Ill. App. 160 (defective rail to area). Compare, also, *Learoyd v. Godfrey*, 138 Mass. 315 (police officer, in discharge of duties, injured by defect in passageway).

(3) **Where Intended Use is Public**—Wharves, Piers, etc.—A more frequent application of this rule that a landlord who knows, or who by the exercise of reasonable care might know, of defects in his premises, will be liable for the injurious consequences should he fail

to disclose them to the lessee is in that class of cases where the use which the lessor knows the premises are to be put to is a public one, as in the case of a wharf, pier, etc.

Here, as in other cases, the lessor is not, in the absence of express agreement to that effect, bound to make repairs of the premises, which repairs become necessary only after the tenant has taken possession: *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; nor is he bound to repair even where he has covenanted to do so, or is bound to do so by statute, until notice of the defect has been given him, or he is in some manner put upon notice thereof: *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204. Nor is the owner of a wharf, any more than the owner of other property, an insurer of its safety, and although defects may have existed at the time of the lease, his liability rests upon proof of negligence, and he is not responsible, in the absence of proof that he knew of such defect, or by the exercise of reasonable care might have known thereof: *State v. Boyce*, 73 Md. 469, 21 Atl. 322. These are merely applications of principles already discussed.

When, however, the defect not only existed at the date of the contract of letting, but was then such that the owner knew, or in the exercise of reasonable care should have known, of it, the authorities are uniform in holding that it is negligence in him to let the wharf in such defective condition: *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Moody v. City of New York*, 43 Barb. 282, 34 How. Pr. 288; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620. See, also, *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *State v. Boyce*, 73 Md. 469, 21 Atl. 322. (As to whether one who buys or receives as devisee a defective wharf, subject to a lease, is liable, see *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193, and monographic note to *Leahan v. Cochran*, 86 Am. St. Rep. 508-523.) In all of these cases stress is laid upon the nature of the use to which the premises were to be put.

(4) **Public Halls, etc.**—The same considerations are held to control where the use for which the premises are let is that of a public exhibition, meeting, etc. Here, again, there cannot be a recovery against the lessor unless negligence on his part is shown: *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Bard v. New York etc. R. R. Co.*, 10 Daly, 520. The nature of such intended use, however, is held to make it negligence for a lessor to lease such premises where he has knowledge of their defective condition, or by reasonable diligence would obtain such knowledge: See *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed in 163 N. Y. 559, 57 N. E. 1109. See, also, *Camp v. Wood*, 76 N. Y. 92. Compare, also, *Copley v. Balls*, 9 Kan. App. 465, 60 Pac. 656 (dangerous excavation on premises leased for hotel purposes. Here, however, the defect was known to the lessor at the time of the demise).

(5) **Public Nature of Intended Use—Effect of.**—In the cases we have just considered the courts seem to regard the circumstance that the property has been let for a purpose which contemplates its use by the public as one which makes of these cases a class peculiar in itself and forming an exception to the general rule of caveat emptor. "There are cases," it is said in *Sterger v. Van Sicklen*, 132 N. Y. 499, 28 Am. St. Rep. 594, 30 N. E. 987, "where the use to which an owner of property puts it is of such a public character that he is bound to observe reasonable care in keeping it in such condition as to save harmless those who are invited to come on it for the benefit and profit of the owner" (distinguishing in this way the wharf cases already considered). In *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed in 163 N. Y. 559, 57 N. E. 1109, this idea is even more forcibly expressed with especial reference to premises let for public exhibitions. "While it is undoubtedly true, in ordinary cases, in the leasing of buildings that there is no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are leased, the rule is different in regard to buildings and structures in which public exhibitions and entertainments are designed to be given, and for admissions to which the lessors directly or indirectly receive compensation. In such cases the lessors or owners of the buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used, and impliedly undertake that due care has been exercised in the erection of the buildings": Citing *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Grote v. Railroad Co.*, 2 Ex. 251; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Wendell v. Baxter*, 12 Gray, 494.

It may well be that due diligence and care require greater exertions where the premises are to be used by the public than where they are let for purely private purposes, and where, therefore, no great multitudes are to be anticipated. But it is not believed that any distinction should properly exist so far as the requirement of reasonable diligence is concerned, between cases where the premises are to be used for public purposes and where they are to be used for private purposes. "In the one case we have an instance of a quasi public nuisance, in the other of a quasi private nuisance. But the obligation not to expose the individual to danger is the same as that not to expose the public to danger. . . . One is where the danger is to the individual; the other when it is to a number of individuals, or to the entire public": *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297.

(6) **Where Intended Use is Not Public.**—Nor has the principle been always restricted to cases in which the intended use of the premises

was a public one in the sense that the public generally were invited thereto. In *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, it appeared that Godley had erected a building, "loosely, carelessly, unskillfully and negligently, and of such insufficient and improper materials" that it fell on a laborer working thereon. The building had been built for use as a United States bonded warehouse, and had been leased to the government for that purpose prior to the accident. The court held the defendant liable for the injuries to plaintiff, Woodward, J., delivering the opinion: "We care not how distinctly it is understood that when a man erects a building to rent the law requires a reasonable share of that regard for human life which he is sure to manifest when he builds for his own inhabitation. If he will build, as is charged and found in this case, 'loosely, carelessly, unskillfully and negligently,' and with 'insufficient and improper materials,' whereby the innocent and unsuspecting are injured, let him respond in damages. He is bound to employ reasonable skill and diligence in the erection of his building, regard being had to the uses and purposes for which it was designed."

Carson v. Godley, 26 Pa. St. 111, 67 Am. Dec. 404, was an action arising out of the same facts, except that the injury complained of was the destruction of a large quantity of sugar which was in the warehouse at the time of its collapse. Woodward, J., again delivered the opinion of the court, and after showing *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, to be indistinguishable on principle from the case at bar, and expressly denying that any liability could be predicated upon an implied warranty as to the safety of the premises or their propriety for the intended use, reaffirmed the doctrine of the *Hagerty* case, and held the defendant liable. "The underlying principle of this case is found in that great maxim of the common law. 'Sic utere tuo ut alienum non laedas.' This is a principle of universal obligation, and it attended Mr. Godley when he undertook to cover his lot in Granite street with storehouses for the use of his tenants."

In *Jaffe v. Hartean*, 56 N. Y. 398, 15 Am. Rep. 438, it is attempted to distinguish *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, as being "disposed of upon the particular facts of the case," and it is said that such importance as was attached in the Pennsylvania case to the fact that the building was erected by the defendant "may have been regarded as proper in that case as tending to show him guilty of fraud." However proper such a theory might have been in *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, it was not the theory upon which the declaration proceeded or the opinion was rendered. Not fraud, but negligence, was the basis of that decision.

(7) **Covenant by Lessee to Repair.**—Whether, when premises are defective at the time of the demise, and the lessor knows, or should know, of such defect, he is relieved of the imputation of negligence by a contract with the lessee that the latter shall repair, is a ques-

tion upon which the authorities are not entirely harmonious. *Pretty v. Bickmore*, L. R. 8 Com. P. 401, 28 L. T. 704, 21 Week. Rep. 733, followed in *Gwinnell v. Eames*, L. R. 10 Com. P. 658, 32 L. T. 835 (compare, also, *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76), hold the affirmative of the proposition, and under the view of these cases the covenant of the tenant to repair relieves the landlord of responsibility. The better view, however, and that taken by the weight of authority is opposed to this. As is said in *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295: "The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so that a person upon whom there rests a duty to others may, by an agreement solely between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill it would not; as if in this case insufficient repair of the pier had been made by a builder, who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessee, to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from liability." And while in the case from which the quotation is made, the view that one who leases a pier in a defective condition was liable to one injured in consequence, was sustained by a bare majority of the judges, "all concur in the proposition that if defendants are liable, the covenant of their lessees to repair would not shield them from liability." To the same effect, see *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109; *Abern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; *Moody v. City of New York*, 43 Barb. 282, 34 How. Pr. 288. See, also, *Nugent v. Boston etc. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 161; and post, II, b, 5, M.

(8) **Inconsistency of View that Lessor is Liable With Doctrine of Caveat Emptor.**—It is a question which has given rise to no little discussion and to considerable disagreement among the authorities, whether and to what extent the class of cases just considered (in which lessors of unsafe or unfit premises are held liable as for negligence to third persons lawfully on the premises for resultant injuries) conflicts with the well-settled rule that a lessor of premises does not, by making the lease, impliedly warrant that they are safe or fit for any purpose whatever. These cases hold, as we have seen, that one who leases premises which are so defective as to be dangerous, and who knows, or should know, of this, is guilty of negligence, and responsible for the consequences, and on the same principle that one who, knowingly or negligently, leases premises unfit for the purpose for which he knows they are to be employed, may

likewise be held responsible to third persons for injuries to the persons or property of third parties lawfully on the premises. What, then, becomes of the rule of caveat emptor and the theory that there is no implied warranty of the safety or fitness of the premises?

It is true that the cases in which this liability predicated upon negligence is laid down uniformly recognize the rule that there is no implied warranty, and point out that they proceed, not upon the theory of a breach of any contract, but upon the "liability for personal misfeasance, which runs through all relations of individuals to each other": *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297. It is, however, equally true that the cases which apply the doctrine of "caveat emptor" and "no implied warranty of safety or fitness" to the case of a demise of real property, in most cases, were intended to deny the liability of the lessor in such cases whether upon contract or in tort. "No doubt a duty to take reasonable care to secure reasonable safety might be imposed upon landlords on grounds of policy, irrespective of the condition at the date of the lease. But we see no sufficient reason for departing from the general rule when we consider the relation of landlord and tenant from the point of view of contract, and if there is no implied undertaking to give the tenant more than he hires, we can see no ground for holding a landlord liable in tort for not making the same improvement, or for not mentioning what he did not know": *Holmes, C. J., in O'Malley v. 25 Associates*, 178 Mass. 555, 60 N. E. 387 (disapproving *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297).

While, therefore, the cases recognizing the liability of a lessor for negligence in leasing premises, of whose defective condition or unfitness he knows, or by the exercise of care would know, profess to recognize the rule of caveat emptor, and to be consistent with the cases in which it is applied; and while, also, in some of the cases which apply the rule that there is no implied warranty of safety or fitness, expressions are to be found which recognize a possible liability predicated upon negligence, and independent of the contract (see *Willcox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297), it is undoubtedly true that the view of the cases recognizing the liability as for negligence are in a measure opposed to those which apply the doctrine of caveat emptor. The conflict is one of tendency rather than of actual decision in many cases, but in the one class of cases the tendency is to hold that a tenant and those in privity with him assume all risks arising from defective conditions or the unfitness of the premises at the time of the lease; while in the other a duty of active vigilance to ascertain the condition of the premises is imposed upon the lessor.

Where the defect is patent, under the cases applying the general rule of caveat emptor, there is, it is generally held, no liability in the lessor. Where the theory of negligence is recognized, it is said

that the same result is reached by the theory of contributory negligence. "When the landlord and tenant exercise the same care, and have equal opportunities for examination, there is no ground of liability on the part of the landlord to the tenant, inasmuch as the negligence of the landlord is neutralized in its effect by the negligence of the tenant, and the ordinary rule of contributory negligence by the injured party applies to defeat any recovery by the tenant": *Willeox v. Hines*, 100 Tenn. 538, 66 Am. St. Rep. 770, 46 S. W. 297.

Where the defect is hidden or secret and actually known to the lessor, the latter would be liable under either theory, since this would amount to what is regarded by the authorities as fraud. (See *supra*, II, b, 4, C.)

Where, however, the defect is secret, and is not actually known to the lessor, but would have been ascertained by the exercise of reasonable diligence, the views taken by the two lines of cases are farthest apart. In the one, a duty of active vigilance is enjoined upon the lessor; in the other, no such duty is recognized, the duty of vigilance being held to lie with the tenant and those in privity with him, his licensees, invited guests, employés, etc.

E. Where Lessee Creates the Nuisance or Danger.—A lessor is not, as we have already seen, the principal of his lessee nor responsible for his torts, active or negligent (II, a), or for his failure to keep the premises in repair (II, b, 2, A). On the same principle, he is not liable to a person, who, as servant, licensee, or guest of the tenant, is lawfully on the premises, and injured by a source of danger created or maintained by the tenant without the license or consent of the landlord. A lessor is not, for instance, liable as such for injuries to one lawfully on the premises, resulting from the bite of a vicious dog kept by the tenant: *Jennings v. D. G. Burton Co.*, 73 Hun, 545, 26 N. Y. Supp. 151; or from defective improvements (partitions in a hotel), erected by the lessee during the term: *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310.

F. Improper Use of Premises by Lessee.—Nor is the lessor responsible to third persons injured on the leased premises by reason of his tenant's negligent or improper use of the property demised. Where, therefore, a door opening into space is furnished with proper locks, if the tenant negligently permits it to remain open, and a person walks out of such door and is injured, the landlord is not responsible: *De Graffenried v. Wallace*, 2 Ind. Ter. 657, 53 S. W. 452; *Handyside v. Powers*, 145 Mass. 123, 13 N. E. 462 (door opening into elevator shaft); *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, reversing 18 Tex. Civ. App. 668, 46 S. W. 63. Compare *Camp v. Wood*, 76 N. Y. 92 (hall let for public entertainment). So a lessor is not responsible for the failure of his tenant to properly light a walk at night: *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; or a stairway: *Eyer v. Jordan*, 111 Mo. 424, 33 Am. St. Rep. 543, 19 S. W. 1095, where a guest of the tenant is injured thereon

and the premises were safe in the daytime. On the same principle there can be no recovery against the landlord by a third person for injuries received from the failure of the tenant to cover a hole in the floor, where the hole was used by the tenant in his business: *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87 (to the same effect, see *Dood v. Rothschild*, 31 Misc. Rep. 721, 65 N. Y. Supp. 214 [hole in cellar left uncovered by tenant]); nor will a lessor of a mine be responsible to a servant of the lessee for injuries received by reason of the lessee's improper method of working the mine: *Samuelson v. Cleveland etc. Min. Co.*, 49 Mich. 164, 43 Am. Rep. 456. In these cases, the premises were safe, if properly managed and used, and for the improper or negligent acts of the tenant in these respects, the landlord is in no way answerable.

G. Where Lessor Retains Control of Portion of Premises.

(1) **In General.**—In considering the liability of a lessor to third persons, it has been assumed in the above discussion that the premises were in the possession of the tenant. A landlord may, however, while renting premises, reserve certain parts thereof for his own use and retain them under his own control. Thus, it is held that if a landlord leases premises on which he has machinery for transmitting power to adjoining buildings, he will be deemed to retain control of that portion of the premises in which the machinery is. If he permits an unguarded revolving shaft to be upon the premises, and uses it for transmitting power to adjacent premises, "the responsibility rests with him to see that no injury results to those having rights there by reason of the manner in which such portion of the premises is occupied or used; and if he puts dangerous machinery thereon, it is his duty to fence it, or use other proper means to protect those rightly in its vicinity." If he fails to use such reasonable care, and a person rightly on the premises (as an employé of the tenant) is injured, the lessor is liable: *Davis v. Pacific Power Co.*, 107 Cal. 563, 48 Am. St. Rep. 156, 40 Pac. 950. To the same effect see *Poor v. Sears*, 154 Mass. 539, 26 Am. St. Rep. 272, 28 N. E. 1046. The case is one involving only incidentally the liability of a lessor to third persons lawfully on the premises. The liability is that of any owner in possession of dangerous premises to one rightfully on the premises, and the relation of landlord and tenant is important only as it shows the right of those in privity with the tenant to be on or near the dangerous premises.

(2) **Common Passageways, etc.**—The most frequent case, however, in which is raised the question of the liability of a lessor of premises to third persons injured on the portions of the premises within the control of the lessor, is where premises are let to several tenants, each occupying different portions, but all enjoying or using certain portions in common, such as the halls, stairways, etc., of tenement or apartment houses.

Such portions of demised premises, while used in common by all tenants are in the exclusive control of none. As to them, therefore, the landlord is held to be in control, and owes to his tenants and those lawfully on the premises as the servants, guests, customers, etc., of the tenants, the duty of exercising reasonable care and diligence to keep such parts in safe condition. The common passageways and the approaches of stairways in houses let to several tenants are within this rule, and for failure to exercise reasonable diligence to keep them in repair and safe, he is liable to guests, etc., of the tenant injured in consequence: *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399. This general rule is admitted in *Harkin v. Crumlie*, 46 N. Y. Supp. 453, 20 Misc. Rep. 568 (see S. C., 14 Misc. Rep. 439, 35 N. Y. Supp. 1027); but the landlord was there held not liable on the ground that the injury was caused by the accumulation of smooth ice, and that in analogy to similar cases on the public highway, the landlord was under no duty to remove ice which was dangerous because smooth and slippery.

(3) **Stairways Used in Common by Several Tenants.**—Perhaps the most frequent application of this principle is where the defect complained of is on a stairway used in common by the various tenants. Where the defect was one traceable to negligence on the part of the lessor in keeping such common stairway in repair or unobstructed, the liability of the landlord to third persons lawfully on the premises is clear: *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140; *Harrenson v. Jelley*, 175 Mass. 292, 56 N. E. 283; *Gillyon v. Reilly*, 50 N. J. L. 26, 11 Atl. 481; *Gleason v. Boehm*, 58 N. J. L. 475, 34 Atl. 886; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153; *Monteith v. Finkbeiner*, 66 Hun, 633, 21 N. Y. Supp. 288; *Brady v. Valentine*, 3 Misc. Rep. 19, 21 N. Y. Supp. 776; *Brugher v. Buchtenkirch*, 29 N. Y. App. Div. 342, 51 N. Y. Supp. 464; *O'Sullivan v. Norwood*, 14 Daly, 286, 8 N. Y. St. Rep. 388; *Henkel v. Murr*, 31 Hun, 28; *Miller v. Hancock*, 2 Q. B. 177, 4 R. 478, 69 L. T. 214, 41 Week. Rep. 578. In *Ganley v. Hall*, 168 Mass. 513, 47 N. E. 416, recovery was denied on the ground that the injured person was not an invited guest of the tenant, but a mere licensee.

In some of the cases a distinction is suggested between the liability of a landlord where the injury results from a defective common stairway and where it results from a failure to keep a stairway (otherwise well constructed and safe) properly lighted. "When it comes to the furnishing of artificial light, we cannot say, as a general proposition, that they [i. e., lessors] are called upon to furnish it. In cases of special danger from unusual construction, or by reason of traps and pitfalls, the rule might be otherwise. But as to ordinary halls and stairways, we are not prepared to say that the owners of buildings owe any duty in regard to lighting the same, to the persons who may use them": *Capen v. Hall*, 21 R. I. 364, 43

Atl. 847 (citing *Muller v. Minken*, 5 Misc. Rep. 444, 26 N. Y. Supp. 801, and cases there cited). For similar language, see *Gleason v. Boehm*, 58 N. J. L. 475, 34 Atl. 886; *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580. See, also, *Brugher v. Buchtenkirch*, 29 N. Y. App. Div. 342, 51 N. Y. Supp. 464.

The cases, so far as they hold that failure to light a hallway is not per se negligence, and that mere proof of an accident occurring because of a failure to light the halls and stairways does not sustain an allegation of negligence, are undoubtedly correct. Some of them, it is believed, intend to go no further, despite the general language they employ. The question of negligence is, however, essentially one of fact, and dependent upon all the circumstances. The duty of the landlord is in all cases one of reasonable care, and no hard-and-fast lines as to what is such reasonable care, with the ordinary or the peculiar nature of the hall or stairway as the criterion, can be laid down. In *Brugher v. Buchtenbirch*, 29 App. Div. (N. Y.) 342, 51 N. Y. Supp. 464, the various cases are reviewed, and the court says: "There is no inconsistency between these latter cases and the ones first cited, which hold that the landlord is under no obligation to keep the hallway lighted; for both are but applications of the same general rule that the owners of property are bound to use reasonable care to keep such portions of the premises as are under their control, in such condition that those who lawfully go there shall not be exposed to danger": See, also, *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140. Such is undoubtedly the true rule.

Since, however, the liability of the landlord is dependent upon proof of negligence, he is not responsible where, notwithstanding due care on his part, the common hall or stairway has been rendered unsafe by the fault of another, whether a tenant or a third person. Such, for instance, is the case where the injury occurs, not from a defect in the construction or lighting of the premises, but from the negligent act of another in leaving a trapdoor open in the hallway: *Jucht v. Behrens*, 7 N. Y. Supp. 195, 26 N. Y. St. Rep. 690; *Kaiser v. Hirth*, 36 N. Y. Super. Ct. (4 Jones & S.) 344, 46 How. Pr. 161. The only negligence in such a case is that of a person for whose acts the lessor is not answerable.

(4) *Other Instances.*—The principle that the landlord is bound, as to third persons lawfully on the premises, to employ reasonable care to render safe such portions of the premises and the appliances as are used in common by a number of tenants, is by no means confined in its application to cases of injuries received from defective stairs or passageways. It has been applied to cases of platforms used in common by the tenants of adjoining stores, all of which were leased by defendant to the various tenants: *Readman v. Conway*, 126 Mass. 374; *Coupe v. Platt*, 172 Mass. 458, 70 Am. St. Rep. 293, 52 N. E. 526; to a roof used in common by the tenants of a tenement house as a place over which to dry clothes: *Wilcox v. Zane*,

167 Mass. 302, 45 N. E. 923; to hoisting apparatus used in common by the tenants of several flats, where a person delivering goods to one of such tenants was injured: *O'Malley v. 25 Associates*, 170 Mass. 471, 49 N. E. 641 (compare, however, *S. C.*, 178 Mass. 555, 60 N. E. 387); to the aisles of a market, where stalls were rented out to various dealers: *Washington Market Co. v. Clagett*, 19 App. D. C. 12; to a clothes-pole used in common by the tenants of an apartment house (although negligence was here found not to exist and defendant was, therefore, not held liable): *Lenz v. Aldrich*, 6 N. Y. App. Div. 178, 39 N. Y. Supp. 1022; to a freight elevator used in common by several tenants: *Olson v. Schultz*, 67 Minn. 494, 64 Am. St. Rep. 437, 70 N. W. 779. See, also, *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846, 25 N. E. 978 (elevator well left unguarded by janitor employed by lessor).

The numerous cases in which the liability of a landlord for injuries received by a third person from defects in, or from the negligent operation of, an elevator in office buildings, etc., will not be here considered. The liability there springs, not from his position as lessor, but from the negligent or improper management of an appliance under his control. In this connection see, however, generally, *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953, affirming 88 Ill. App. 529; *Fisher v. Jansen*, 30 Ill. App. 91, affirmed in *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953; *Rhodus v. Johnson*, 24 Ind. App. 401, 56 N. E. 942; *Stewart v. Harvard College*, 12 Allen, 58; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 625, reversing 62 N. Y. Supp. 364, 47 App. Div. 70; *Hubener v. Heide*, 62 App. Div. 368, 70 N. Y. Supp. 1115; *Rutterman v. Ropes*, 51 N. Y. Super. Ct. (19 Jones & S.) 25; *Marker v. Mitchell*, 54 Fed. 637, and monographic note to *Southern Bldg. etc. Assn. v. Dawson*, 56 Am. St. Rep. 806-810, on the liability of owners of elevators used for passengers or employes.

(5) **Actual Notice of Defect Unnecessary.**—We have already (*supra*, 507, 508) considered the necessity of notice to the landlord of a defect needing repair, where his liability is sought to be predicated on a covenant by him to repair. Where his liability is based upon his duty with respect to portions of the premises, which, being used by several tenants in common, are under his control, the question is one of reasonable care, and actual notice of the defect is not necessary. His duty is one of care, and ignorance which is the result of failure to exercise due care is no defense. If, therefore, the lessor had actual notice of the defect, or would have had notice thereof except for an unreasonable omission to ascertain the condition of the premises, negligence may properly be predicated upon a failure to remedy the defect; *Olson v. Shultz*, 67 Minn. 494, 64 Am. St. Rep. 437, 70 N. W. 779; *Monteith v. Finkbeiner*, 66 Hun, 633, 21 N. Y. Supp. 288. See, also, *Henkel v. Murr*, 31 Hun, 28. Compare, however, *O'Malley v. 25 Associates*, 178 Mass. 555, 60 N. E. 387.

5. To Strangers.

A. In General.—We come now to a consideration of the liability of a lessor of real property to such third persons as (unlike the class just considered, which consisted of the licensees, servants, guests, etc., of the tenant) stand strictly upon their rights as strangers. (See *supra*, II, b, 3.) Such are, for instance, the owners or occupants of adjoining premises or persons lawfully on the highway. These persons, unlike guests, servants, etc., of the tenant, do not derive their right to be where they are from the tenant, and the measure of the duties owing by the landlord to them is not, therefore, the same as that of his duties to the tenant.

B. For Nuisance Created by Lessee.—A lessor of real property is not liable to third persons of this class for injuries arising from a nuisance not on the premises at the time of the lease, but which was erected or created by the tenant alone without the license or consent of the lessor. If, for instance, a tenant digs a ditch and builds a dam on the leased premises, the effect of which is to throw water upon the adjoining premises, the landlord cannot be held responsible therefor in the absence of evidence connecting him with the acts complained of. Mere ownership of the land is not sufficient: *Jansen v. Varnum*, 89 Ill. 100. See, also, *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511. So, if a structure from which materials are blown by the wind to the street, injuring plaintiff, was erected by the lessee of the premises during the term of the lease, and was under such lessee's control, the lessor is not responsible: *Ugla v. Brokaw*, 79 N. Y. Supp. 244, 77 App. Div. 310. If a building erected by tenants becomes dangerous by reason of fire during the lease, the lessor cannot be held responsible for the death of a person, who, while lawfully on the street, is killed by a falling wall: *Grogan v. Broadway Foundry Co.*, 87 Mo. 321. In these cases the nuisance was not created by the lessor, nor did it exist at the time of the lease, but was created either by a tenant over whom the lessor had no control, or arose from conditions operating during the period of the lease, and while the lessor was not in control of the premises: See, also, *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582 (injury to adjoining property by tenant of demised premises permitting refuse matter accumulate); *Fleischner v. Citizens' Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Vason v. City of Augusta*, 38 Ga. 542.

C. For Misuse of Premises by Lessee.—The same considerations control where the nuisance is occasioned by a misuse by the lessee of the premises, or of appliances which were thereon at the time of the lease. It is not sufficient to render a lessor liable that the premises leased by him are capable of a use which will prove a nuisance to strangers. "If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will

not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance if the latter should think proper to do so. [Citing *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 4 Com. B. 805, 56 Eng. Com. L. 782.] In such a case it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable": *Maenner v. Carroll*, 46 Md. 193. "The landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way": *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84.

To illustrate: The mere fact that a ditch is so constructed at the time of the lease that, if used in winter, it will form ice on the sidewalk, does not render the lessor liable for an injury caused by an accumulation of ice from the cause. "The injury to the plaintiff was not caused by the presence of the ditch alone, even if it be conceded that the landlord was directly responsible for the existence of the ditch. . . . The connection of the landlord with the matter terminates altogether at the point where the ditch is made upon the premises, and as he was in no way responsible for the acts of his tenants in using the ditch at a time when its use would probably result in the formation of ice upon the sidewalk": *Gardner v. Rhodes*, 114 Ga. 929, 41 S. E. 63.

Where, therefore, the premises, while capable of improper use, may be used in an ordinary manner without the creation of a nuisance, the lessor is not chargeable with the improper uses of them by the tenant which results in a nuisance. Thus, one who leases premises with a flume thereon is not responsible if the lessee diverts through such flume an illegal amount of water, merely because the flume was made capable of carrying that amount: *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543. So a lessor of a mill is not responsible for the acts of his lessee in so employing the mill (in regulating the flow of water), as to injure other land owners: *Sargent v. Stark*, 12 N. H. 332; *Batterman v. Finn*, 32 How. Pr. 501. A lessor of premises with a stable thereon is not responsible for a nuisance to adjoining premises if the nuisance arises merely from the improper use of the stable by the tenant: *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757; *Pickard v. Collins*, 23 Barb. 444. See, for other applications of the same principle, *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585 (pollution of stream by coal-washer operated by tenants); *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346 (awning on which tenant permitted crowd to gather); *Saltonstall v. Bunker*, 8 Gray, 195 (steam engine in city); *Leonard v. City of Homellsville*, 58 N. Y. Supp. 266, 41 App. Div. 106 (shooting gallery); *Rich v. Basterfield*, 2 Cr. & K. 257, 4 Com. B. 783, 16 L.

J. Com. P. 273, 11 Jur. 696 (smoking chimneys where nuisance might be prevented by use of coke as fuel by tenant).

D. For What Injuries Liable—In General.—A landlord is not, therefore, liable to strangers where he has let premises which were in good repair at the time of the lease, where the injury has resulted either (1) from the misuse by the tenant of premises capable of a reasonable, ordinary use which would involve no injury to third persons, or (2) from a nuisance created by the tenant during the lease whether arising from an affirmative act or from the omission on his part to keep the premises in repair. The effect of a covenant by a landlord to repair, upon the right of third persons to recover from him for injury suffered from a lack of repair in the demised premises, has already been considered (II, b, 2, B). Apart from this, however, a lessor of real property is liable to third persons standing in the position of strangers for injuries received wherever (1) the lessor demises the premises with a nuisance thereon which has occasioned the injury; (2) where, at the time of the demise, the premises were so constructed or in such defective condition that a reasonable, ordinary and expected use of them by the tenant would create a nuisance working injury to third persons; (3) where the premises are let to be used for a purpose which may reasonably be expected to create a nuisance; (4) where the lessor has created a nuisance upon or negligently managed such portions of the premises as he retains under his control; or (5) where the cause of injury is created with the license, consent or participation of the lessor.

E. Where Nuisance, etc., Exists at Time of Lease.—The first named, and perhaps the most important, class of cases in which the lessor is properly chargeable with liability to a stranger is where the cause of injury to the latter is a nuisance existing on the premises at the time of the demise. No person can create or maintain a nuisance upon his premises and escape liability for the injury occasioned by it to third persons. Nor can a lessor so create a nuisance and then escape liability for the consequences by leasing the premises to a tenant. Prior to and at the time of the lease, it was the duty of the lessor to put an end to the nuisance. If he fails to do this, and leases the premises with the nuisance on them, he may be deemed, and is deemed, to authorize the continuance of the nuisance, and is therefore liable for the consequences of such continuance. Whether, therefore, the defect be one of original construction, or arises from a failure to repair, or from the maintenance on the premises of any condition endangering the health or safety of strangers, whatever its nature, if it constitute a nuisance, the lessor will be responsible for its consequences if he leases the premises with the nuisance upon them, and thus authorizes its continuance. The authorities supporting this proposition are abundant: See *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346; *Rider v. Clark*,

132 Cal. 382, 64 Pac. 564; *City of Denver v. Solomon*, 2 Colo. App. 534, 31 Pac. 507; *Stephani v. Brown*, 40 Ill. 428; *Gridley v. City of Bloomington*, 68 Ill. 47; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800, affirming 28 Ill. App. 142; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439; *East End Imp. Co. v. Sipp*, 14 Ky. Law Rep. 924; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Delay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Busching v. Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Gordon v. Peltzer*, 56 Mo. App. 599; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Durant v. Palmer*, 29 N. J. L. 544; *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *McGrath v. Walker*, 64 Hun, 179, 18 N. Y. Supp. 915; *Holroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. Supp. 442; *Davenport v. Ruckman*, 23 N. Y. Super. Ct. (10 Bosw.) 20, 16 Abb. Pr. 341, affirmed in 37 N. Y. 568; *Walsh v. Meed*, 8 Hun, 387; *McIlvaine v. Wood*, 2 Handy (Ohio), 166; *Shindlebeek v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Fleischner v. Citizens' Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Waterhouse v. Joseph Schlitz Brewing Co.*, 12 S. Dak. 397, 81 N. W. 725; *Patterson v. Joseph Schlitz Brewing Co. (S. Dak.)*, 91 N. W. 336; *Perez v. Raband*, 76 Tex. 191, 13 S. W. 177; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; *Boston Beef Packing Co. v. Stephens*, 20 Blackf. 443, 12 Fed. 279; *Swalbach v. Shinkle, Wilson & Kreis Co.*, 97 Fed. 483; *Gandey v. Jubber*, 5 Best & S. 78, 33 L. J. Q. B. 151, 10 Jur. N. S., 652, 9 L. T. 800, 12 Week. Rep. 526; *S. C.*, 5 Best & S. 485; *S. C.*, 9 Best & S. 15; *Rosewell v. Prior*, 2 Salk. 460; *Todd v. Flight*, 9 Com. B., N. S., 377, 30 L. J. Com. P. 21, 7 Jur., N. S., 291, 3 L. T. 325, 9 Week. Rep. 145; *Nelson v. Liverpool Brewery*, 46 L. J. Com. P. 675, 2 C. P. D. 311, 25 Week. Rep. 877.

F. Where Ordinary Use of Premises Will Create a Nuisance.—

In order, however, that the landlord be held responsible for a nuisance on the demised premises, it is not necessary that the cause of the injury be in and of itself a nuisance at the time of the lease. Leases are made with a view to the use of the premises leased, and if, at the time of the lease the premises are so defective, or a structure thereon is of a nature such that the reasonable, ordinary and expected use of the property leased must result in a nuisance, the landlord is properly chargeable with the consequences. If a cook-stove be so constructed and placed as that when used as it was intended to be, it injures the goods of the owner of adjoining property, it is no defense that the injury resulted wholly from the act of the tenant in building a fire in the stove, and that the stove itself, when not employed, is no nuisance. In letting the premises, the reasonable use of the stove was contemplated by both lessor and lessee, and the

former is responsible for any injury resulting from its defective or improper condition at the date of the lease, rendering its ordinary use by the tenant a nuisance: *Grady v. Walsner*, 46 Ala. 381, 7 Am. Rep. 593.

This class of cases is to be distinguished from that already considered (If, b, 5, C), in which the premises, although capable of a use which would create a nuisance, are also capable of a reasonable use where this would not result. In the one class the nuisance is caused by the use of the premises in the way necessarily contemplated by the parties to the lease, and the injury is the result of such use. In the other, the nuisance is occasioned by a use which, while manifestly possible, was not necessarily contemplated by the lessor. The application of the distinction to particular cases is not always clear, but the distinction itself is well settled, both on reason and on authority.

If, therefore, the injury to the person or property of a stranger is the result of the reasonable, ordinary and contemplated manner of use of the premises, the lessor will be responsible therefor, although unused, and as they stood at the time of the demise, the premises were not, of themselves, a nuisance: *Grady v. Walsner*, 46 Ala. 381, 7 Am. Rep. 593 (cook-stove injuring goods of adjoining owner); *House v. Metcalf*, 27 Conn. 631 (wheel of mill revolving, scaring horses); *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189 (lumber dry kiln on premises at time of lease); *Jackman v. Arlington Mills*, 137 Mass. 277 (pollution of stream by use of drains. See, also, *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585); *Knauss v. Brua*, 107 Pa. St. 85 (filtration from cesspool used by tenant. To the same effect, *Board of Health v. Valentine*, 57 Hun, 591, 11 N. Y. Supp. 112; *Fow v. Roberts*, 108 Pa. St. 489; *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702, 19 Atl. 749; *Wood v. Gardner* (Pa.), 2 Atl. 867; *Rex v. Pedley*, 1 Ad. & E. 822, 28 Eng. Com. L. 220. Compare, also, *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010. For cases of filtration from stables, see *Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757; *Pickard v. Collins*, 23 Barb. 444); *Whitney v. Clifford*, 46 Wis. 138, 32 Am. Rep. 703, 19 N. W. 835 (sparks from defective smokestack. Compare *Rich v. Basterfield*, 2 Car. & K. 257, 4 Com. B. 783, 16 L. J. Com. P. 273, 11 Jur. 696).

G. Where Premises are Leased for a Noxious Purpose.—A lessor may, moreover, be chargeable with the consequences of a nuisance where the property is leased for a purpose which must prove offensive or dangerous to third persons. If, therefore, one knowingly lets premises to be used for burning lime: *Harris v. James*, 45 L. J. Q. B. 545, 35 L. T. 240; for the manufacture of boilers: *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; for burning brick: *White v. Jameson* L. R. 18 Eq. 303, 22 Week. Rep. 761; for use as a bawdy-house: *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Marsan v.*

French, 61 Tex. 173, 48 Am. Rep. 272; or for any other purpose harmful to adjoining owners, he is deemed to authorize the nuisance, and is liable for the injury it may do to third persons: See, also, *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189. Where, however, the lessor believes that the premises are to be used for an inoffensive purpose, he is not responsible for the act of the lessee in employing them for a purpose which gives rise to a nuisance. Thus in *Muller v. Stone*, 27 La. Ann. 123, the lessor let the premises, thinking they were to be used as a place for boiling molasses, and was held not responsible for damages resulting from their use, without his knowledge, as a sugar refinery.

H. Where Lessor Retains Control of a Portion of the Premises.—

We have already considered the liability of a lessor, who retains control of a portion of the demised premises to third persons lawfully on such premises for injuries resulting from his (lessor's) negligence in managing the parts so retained under his control (*Supra*, II, b, 4, G). If, however, the wrongful acts or omissions of the lessor in this particular result in injuries to third persons standing on their rights as strangers, the lessor is equally responsible. We shall have occasion to consider the application of this rule to various particular cases hereinafter. See, however, as illustrative of the general principle, where landlord retains control of awning in front of building occupied by several tenants, *Milford v. Holbrook*, 9 Allen, 17, 83 Am. Dec. 735; of sidewalk, etc., in front of building occupied by several tenants: *Stevenson v. Jay*, 152 Mass. 45, 25 N. E. 78; *Kirby v. Boylston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971; *Sturmwald v. Schreiber*, 74 N. Y. Supp. 995, 69 App. Div. 476. See, also, *post*, II, b, O, (6), (c). Roof of house let to several tenants: *Shipley v. 50 Associates*, 101 Mass. 251, 3 Am. Rep. 346; *S. C.*, 106 Mass. 194, 8 Am. Rep. 318 (as distinguished. *Leonard v. Stover*, 115 Mass. 86, 15 Am. Rep. 76); *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628, and see *post*, II, b, 5, O, (3).

I. Where Lessor Assents to or Licenses the Act Causing the Injury.—Where the cause of injury is one created or maintained by the license, consent, concurrence, or participation of the landlord, so that he becomes the principal of, or a joint tort-feasor with, his tenant in doing the wrongful act or in the maintenance of the nuisance, he is, of course, responsible to a third person injured thereby. The liability in such a case results, *not* from his status as lessor, but is fundamental, and the result of participation in the wrong. See, in this connection *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511; *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293, followed in *Cotts v. Simpson* (Cal.), 23 Pac. 294; *Twiss v. Baldwin*,

9 Conn. 291; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582; *Scott v. Bay*, 3 Md. 431.

J. Renewal of Lease Equivalent to Original Letting.

(1) **In General.**—Where the liability of the lessor depends upon the condition of the premises at the time of the lease, there is no difference between an original contract of letting, and the renewal of an existing lease. Whatever the condition of the premises at the time they were originally demised, if, when the lease was renewed, a nuisance existed thereon, the renewal is deemed an authorization by the lessor of the continuance of the nuisance. The reason for the rule is well expressed by Magie, J., in *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109: "Nor do I perceive how the liability of the landlord in such cases will be diminished by the fact that he renewed the tenant's lease without retaking actual possession. Such a conclusion would be opposed to the principles creating and governing his liability. If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon the tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires, his right of entry and power to abate at once arise, and, for that reason, a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor evaded. The test of his liability in such a case is his power to have remedied the wrong. If he has, but fails to exercise such power, his liability remains." To the same effect, see *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511; *Barmen v. Sandgren*, 37 Ill. App. 160; *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; *Babbage v. Powers*, 54 Hun, 635, 7 N. Y. Supp. 306; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Whalen v. Gloucester*, 6 Thomp. & C. 135, 4 Hun, 24; *Fleischner v. Citizens' Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Waterhouse v. Joseph Schlitz Brewing Co.*, 12 S. Dak. 397, 81 N. W. 725; *Gandy v. Jubber*, 5 Best & S. 78, 33 L. J. Q. B. 151, 9 L. T. 800, 10 Jur., N. S., 652, 12 Week. Rep. 526. The same reasons, and, therefore, the same rule, controls where the tenant sells out to another party, and the lessor, without taking possession of the premises, makes such other party his lessee. There is in such a case not merely a continuation of the old tenancy, but the creation of a new one: *Metzger v. Schultz*, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619.

(2) **Where Tenancy is from Month to Month, Year to Year, etc.**—Upon the question whether, when premises are let under a tenancy

from month to month, from year to year, etc., there is held to be a "renewal" of the lease within this rule at the end of each of such periods, so that the lessor may be held liable if a nuisance exists on the premises at the end of any month, or year (as the case may be), and the letting is not then terminated, the authorities are not in accord. In *Gandy v. Jubber*, 5 Best & S. 78, 3 L. J. Q. B. 151, 10 Jur., N. S., 652, 9 L. T. 800, 12 Week. Rep. 526, it was held that a tenancy from year to year was, in effect, a new demise at the end of each year, and if, at that time, the premises had a nuisance upon them, the lessor was responsible if he continued the tenancy without removing the nuisance. This was in the queen's bench. The exchequer chamber was, however, prepared to reverse this (9 Best & S. 15), although the judgment prepared and reported (9 Best & S. 15) was never delivered, the plaintiff having accepted a stet process as recommended by the court (5 Best & S. 485). The opinion referred to shows, however, that in the opinion of the exchequer chamber a tenancy from year to year does not involve a reletting at the beginning of each year, but is, rather, a tenancy from year to year "so long as both parties please," and terminable on giving the proper notice: Compare *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237.

In *Sandford v. Clarke*, L. R. 21 Q. B. D. 398, the tenancy was one from week to week, and the court held that the continuation of the tenancy involved the same liability as an actual reletting weekly. *Gandy v. Jubber*, 5 Best & S. 78, 9 Best & S. 15 (*supra*), was distinguished as being a case of yearly tenancy which required something to be done in order to determine the tenancy, "but no such modification," said Wills, J., "is imported into a tenancy from week to week."

Where the tenancy is one from month to month, it has been held that if, at the expiration of any such period, a nuisance exists upon the premises, the case is to be regarded as a case of reletting the premises with a nuisance thereon, and the lessor is responsible for the consequences: *Borman v. Sandgren*, 37 Ill. App. 160; *East End Imp. Co. v. Sipp*, 14 Ky. Law Rep. 924. See, also, *Griffith v. Lewis*, 17 Mo. App. 605; *Padberg v. Kennedy*, 16 Mo. App. 556; *Curran v. Flammer*, 49 App. Div. 293, 62 N. Y. Supp. 1061. In *Hull v. Sherrod*, 97 Ill. App. 298, on the other hand, this is denied, and a view is taken of the species of tenancy very similar to that taken by the court of exchequer chamber of a tenancy from year to year, in *Gandy v. Jubber*, 9 Best & S. 15, *supra*. In the Illinois case (97 Ill. App. 298), the court says: "Appellant's counsel contend that 'the terms of the tenancy expired with the end of each month, that each succeeding month was a new letting,' and that, in that way, appellant had relet the premises to Mrs. Campbell, after the gate was reconstructed. We cannot agree to the proposition that the tenancy in this case so term-

minated at the end of each month as to amount to a surrender of possession and control, and a new leasing and new possession for each succeeding month. The tenancy might have been terminated by either party, upon giving the other thirty days' previous notice, but this was not done. There was not a day from the time the contract was made that it was not in full force, nor a day from the time that Mrs. Campbell entered into possession that she did not have exclusive possession and control of the whole premises under that contract. By the letting to Mrs. Campbell, and her entrance into possession, appellant was divested of possession and control, and he was not at any subsequent date reinvested, nor did he in any manner, at any time, resume control, or assume the right to do so."

In *Glass v. Coleman*, 14 Wash. 635, 45 Pac. 310, a hotel had been leased to a tenant from month to month, but the injury complained of by the plaintiff was caused by improvements erected by the tenant under an agreement by which the tenant might remove such improvements, and the materials used in making them at the end of the term. The court, speaking through Hoyt, C. J., says: "If the tenancy ended with the end of the month, so that it was necessary to have a reletting by the landlords, it must be presumed that as between the landlords and the tenant there was, at the termination of each of such terms, an assertion by the tenant of his right to take out these improvements, and upon the commencement of the new term of putting them in again. The continuance of the occupancy with this understanding of the right of the tenant to remove the materials must be held to have created no liability on the part of the landlords which would not have existed if the improvements had been taken out at the end of each term, and put in again by the tenant at the commencement of the succeeding term."

K. Liability of One Who Acquires Property Subject to Lease, and With a Nuisance Upon It.—Whether and when a lessor who has acquired premises by purchase or devise, subject to a lease is liable as for a continuance of a nuisance which was on the premises at the time he acquired them, will be found discussed in the recent monographic note to *Leahan v. Cochran*, 86 Am. St. Rep. 508-523, on the liability of a property owner for a nuisance which he did not create: See, generally, in this connection, *Pierce v. German Sav. etc. Soc.*, 72 Cal. 180, 1 Am. St. Rep. 45; *Metzger v. Schultz*, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757; *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193; *Woram v. Noble*, 41 Hun, 398.

L. Actual Knowledge of Defect Existing at Time of Lease not Essential.—Where the owner of property with a nuisance thereon leases it while in that condition, it is no defense that he had no actual knowledge of the existence of the nuisance. It is sufficient if

by the exercise of reasonable diligence it would have been brought to his knowledge. "This does not impose the duty of constant care and inspection of premises upon an owner who has let them. It imposes upon him the duty of reasonable care to inform himself of the condition of property which he proposes to let, and if, at the leasing, he knew, or if, in the exercise of reasonable care, he would become informed of the fact, that the property has upon it a nuisance dangerous to the public, or to an adjoining owner, it imposes upon the owner and proposed lessor the duty to abate it before he leases the property, and if he does not, it leaves him with a liability to respond in damages to anyone injured in consequence of and by the nuisance": *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786. See, also, *Gwinell v. Eames*, L. R. 10 Com. P. 658, 32 L. T. 835 (as explained in *Borman v. Sandgren*, 37 Ill. App. 160). For the necessity of notice or actual knowledge of the defect under statutory provisions, see *Barnes v. Beirne*, 38 La. Ann. 280; *Patterson v. Joseph Schlitz Brewing Co.* (S. Dak.), 91 N. W. 336. See, also, *supra*, II, b, 2, (6), and II, b, 4, G, (5).

M. Covenant by Lessee to Repair.—With reference to the effect of a covenant by the lessee to repair, as operating to relieve the lessor from liability for demising premises in such defective repair as to constitute a nuisance, the same considerations control, where the person injured is a stranger, as in the case already considered (*supra* II, b, 4, D, (7), where such person is on the premises by the license or at the invitation of the lessee. As in the latter class of cases, there is a conflict of authority (*Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84), but although it has been held that such a covenant by the lessee absolves the lessor from further responsibility (*Pretty v. Bickmore*, L. R. 8 Com. P. 401, 28 L. T. 704, 21 Week. Rep. 733, followed in *Gwinell v. Eames*, L. R. 10 Com. P. 658, 32 L. T. 835), the weight of authority and of reason supports the contrary view: *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237, and cases cited *supra*, II, b, 4, D, (7).

N. Instances of Liability to Owners or Occupant of Adjoining Premises.—In the foregoing discussion of general principles, numerous instances of their application to particular cases have been interspersed, and have rendered it unnecessary and impracticable, except with considerable repetition, to consider separately the liability of a lessor for injuries to the person or property of the owners or occupants of adjoining premises, in each of the many classes of nuisances which are thus injurious. All are governed by the same general principles, and these we have discussed.

(1) **Cesspools, Privy Vaults, etc.**—A class of cases of frequent occurrence, however, is that in which the injury has been done to the

health or property of an adjoining owner by cesspools, privy vaults, etc., upon the demised premises. Where the filtration is the result not of any defect in the original construction of the vault, or of any want of repair existing at the time of the lease, but results wholly from the failure of the tenant to keep it in repair, the lessor (at least in the absence of a covenant by him to keep the premises in repair, as to which see II, b, 2, B), is not liable for the injury thus caused: *Vason v. City of Augusta*, 38 Ga. 542; *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010; *Anheuser Busch Brewing Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 373. See, also, *Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582 (accumulation of refuse on leased premises). Where, on the other hand, at the time of the lease, or a renewal thereof, the cesspool or vault was in such a condition, or so constructed, that the ordinary use of it by the tenant would result in injury to adjoining premises, or the health of adjoining owners, the lessor is properly chargeable with the consequences: *Board of Health v. Valentine*, 57 Hun, 591, 11 N. Y. Supp. 112; *Fleischner v. Citizen's Real Estate etc. Co.*, 25 Or. 119, 35 Pac. 174; *Knauss v. Brua*, 107 Pa. St. 85; *Fow v. Roberts*, 103 Pa. St. 489; *Wunder v. McLean*, 134 Pa. St. 334, 19 Am. St. Rep. 702, 19 Atl. 749; *Rex v. Pedly*, 1 Ad. & E. 822, 28 Eng. Com. L. 220.

(2) **Barns, Stables, etc.**—The liability of a lessor for a nuisance arising from a barn or stable on the leased premises is governed by the same rules. If the construction or condition of the stable at the time of the lease be such that the lawful use of it by the lessee in the manner which must have been contemplated by the lessor, would give rise to a nuisance. If, however, the nuisance is caused by the improper management of the property by the tenant, the lessor is not liable. Merely leasing property with a stable thereon is not sufficient to create liability, since such a structure is not in and of itself, or necessarily, a nuisance: *Metropolitan Sav. Bank v. Manion*, 57 Md. 68, 39 Atl. 90; *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757; *Pickard v. Collins*, 23 Barb. 444.

(3) **Defective Plumbing, etc.**—For injury to the owner or occupant of premises adjoining those leased from plumbing (water and gas pipes, drains, sewers, etc.), the landlord is not liable where the nuisance results merely from a failure of the tenant to keep these appliances in proper repair. Properly constructed, they are not nuisances, and the lessor is not chargeable with the negligence of the lessee, which makes them such: *Deutsch v. Abells*, 15 Mo. App. 398; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Strauss v. Hamersley*, 37 N. Y. St. Rep. 749, 13 N. Y. Supp. 816. (Compare, however, *Bellows v. Sackett*, 15 Barb. 96.) See, also, *Murray v. Richards*, 1 Allen, 414, where land of adjoining owner was overflowed by reason of the negligence of tenant in leaving drain open while making repairs. If, however, at the time of

the lease, or a renewal of it, the plumbing was so defective that an ordinary use of it by the tenant would make it a nuisance, the lessor is liable: *Metzger v. Schultz*, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619 (defective gaspipe); *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109 (defective waterpipe); *Wood v. Gardner* (Pa.), 2 Atl. 867 (defective sewer).

In *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, injuries were received by a visitor of the occupant of premises adjoining those on which defendant, the water company, maintained a large tank or standpipe full of water, which fell, allowing the water to escape, and inflicting the injuries complained of. The court held the defendant liable on the ground that one who collects on his premises a substance liable to escape, and thereby cause mischief, must use at least reasonable care to prevent its escape. The plaintiff was, however, a visitor of an employé of the water company, who occupied a house belonging to the company on the same parcel of land as the tank, yet the court held that such employé was in the position of an occupant of adjoining premises. To this Burket, J., dissented, saying: "There is no rule of law warranting the placing of the house on adjoining premises, when it in fact stands upon the premises of the waterworks company." According to the view of the dissenting judge, the plaintiff was on the same premises as the standpipe, and not on adjoining premises," and therefore the water company owed no duty to her, and when she went on the premises without the invitation of the company she went at her own peril."

(4) **Interference With Water Rights.**—Where the nuisance complained of by the owners or occupant of neighboring premises is the increase or diminution of the flow of water upon or past such premises, the liability of the landlord depends upon the same considerations as in the cases we have been discussing. A lessor is of course liable for a diversion of water by his tenant if such diversion is caused by the tenant as his agent or with his concurrence: *Twiss v. Baldwin*, 9 Conn. 291. On the other hand, the lessor is not liable, where no such participation or concurrence is shown, for the act of his tenant in building a dam and digging a ditch, the effect of which is to overflow the plaintiff's land: *Jansen v. Varnum*, 89 Ill. 100. See, also, *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511. Nor is the owner of a mill or flume liable to lower riparian proprietors for the effects of an improper diversion of water by the tenant. If a proper and reasonable use of the mill or watercourse would not have the effect complained of, the lessor cannot be presumed to have sanctioned an improper use: *Gould v. Stafford*, 91 Cal. 146, 27 Pac. 543; *Fiske v. Framingham Mfg. Co.*, 14 Pick. 491; *Batterman v. Finn*, 32 How. Pr. 501.

Similarly, if the proper use of the premises leased would not result in the pollution of a stream, the landlord is not responsible for

the acts of the tenant in so using the premises as to accomplish this result: *Coal Run Coal Co. v. Giles*, 49 Ill. App. 585; *Little Schuylkill Nav. etc. Co. v. Richards*, 57 Pa. St. 142, 98 Am. Dec. 209. If, on the other hand, the drains, etc., of the leased premises are adopted and intended to be used in a manner which would result in the pollution of the stream, the lessor will be deemed to authorize their use in this manner, and will be chargeable with the consequences: *Jackman v. Arlington Mills*, 137 Mass. 277.

O. Instances of Liability to Persons on Highways.—Where the lessor is sought to be held liable for the injuries to a person lawfully upon a highway upon which the leased premises abut, the same considerations in general control as where the injury is to one lawfully upon premises adjoining those leased. In either case the person injured was where he had an entire right to be without any license from either landlord or tenant, and the duty owed him by the lessor is that owed to any stranger and predicated upon the principle, "*Sic utere tuo ut alienum non laedas.*"

(1) Defective Awnings.—Where the owner of a building leases it with a wooden awning suspended over the sidewalk, if the awning is safe for its intended purpose at the time of the lease the lessor is not responsible for injuries to one on the highway upon whom the awning falls by reason of the act of the tenant in allowing a crowd witnessing a passing procession to gather on the awning: *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568, 11 Pac. 346. Where, however, the awning falls because of a defect in the wall to which it was negligently attached, and although it was built by the tenant, the landlord knew of the awning being put there and contributed materials, the latter is responsible for injuries to one passing along the highway at the time of the accident: *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293, followed in *Cotts v. Simpson* (Cal.), 23 Pac. 294. In *Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. 1188, the lessor was held responsible for the injuries to a stranger from the fall of an awning suspended over the sidewalk, although the accident occurred from failure to make repairs. There was, however, a covenant by the lessor to repair (see *supra*, II, b, 2, B), and the license from the city to maintain the awning was, moreover, conditional upon the structure being securely placed and supported.

In *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735, the defendant was the owner of a building, on the lower story of which were three shops, the upper story was divided into rooms, all but one of which (and that one retained by the defendant) were leased to various tenants. Across the whole front of the building was an awning erected for the benefit of the shops. The awning fell, through lack of repair, but the court held that the case was governed by the rule applicable to parts of a building used in common by several tenants

of a building (supra, II, b, 5, H), that the lessor was to be regarded as in control of the awning, and therefore liable for a failure to repair. "We think," says Hoar, J., "his liability for the awning is like that which he would be under for the condition of the roof, the eaves, the chimneys, or other parts of the building not appropriated to the exclusive use of any particular tenant, or to all of them to the exclusion of the landlord."

In *Fellows v. Gilhuber*, 82 Wis. 639, 52 N. W. 307, injured while standing on a sidewalk in front of a hotel in which he was a guest the cause of the injury being the fall of a wooden awning attached to the hotel, which awning the jury found was in an unsafe and dangerous condition at the time defendant leased the hotel. The defendant was held not liable, the court apparently placing its decision on the ground that plaintiff was not a stranger or a member of the traveling public at the time of the accident, but a guest of the tenant, to whom the rule *caveat emptor* applied.

(2) **Falling Walls, Chimneys, etc.**—If the owner of a building lets it while it is in such a defective condition as to endanger the lives of persons in the highway by the possibility of its collapse or the fall of its chimneys, cornices, etc., he is chargeable in the event of such injuries occurring. He is in the position of one demising premises with a nuisance upon them, and is responsible for the consequences: See *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786; *S. C.*, 54 Hun, 44, 7 N. Y. Supp. 158; *Waterhouse v. Joseph Schlitz Brewing Co.*, 12 S. Dak. 397, 81 N. W. 725 (see, also, *Patterson v. Joseph Schlitz Brewing Co.* (S. Dak.), 91 N. W. 336); *Todd v. Flight*, 9 Com. B., N. S., 377, 30 L. J. Com. P. 21, 7 Jur., N. S. 291, 3 L. T. 325, 9 Week. Rep. 145 (fall of chimneys on adjoining lands.)

If, however, the injury is the result of a lack of repair, and the need of repairs arose subsequent to the lease, the duty of making such repairs being *prima facie* with the lessee, the lessor is not responsible for his tenants' failure to perform his duty: *Grogan v. Broadway Foundry Co.*, 87 Mo. 321 (fall of wall of building erected by tenant and weakened by fire during term). See, also, *Nelson v. Liverpool Brewery Co.*, 46 L. J. Com. P. 675 2 C. P. D. 311, 25 Week. Rep. 877 (fall of chimney pot, but on person who was in a yard on the leased premises). Where the landlord uses the defective structure jointly with the tenant, and has agreed to keep it in repair, he is responsible to a third person injured by his failure to do so. (See *Boyce v. Fullerman*, 183 Ill. 115, followed in *Boyce v. Snow*, 187 Ill. 181, 58 N. E. 403, affirming 88 Ill. App. 402. Here also the injured party was not upon the highway at the time, but the same principles are applicable.) In Louisiana every owner is by statute bound to keep his buildings in repair so that neither their fall nor that of any part of them may injure neighbors or people passing. For a failure

to do this a lessor is responsible: *Barnes v. Beirne*, 38 La. Ann. 280.

In *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628, the plaintiff's wife was injured while passing along the street by the fall of a fire-wall and cornice from a building of the defendant. The building was rented to several tenants, each occupying a different portion, and it was held that the trial court rightly left it to the jury to say whether those parts of the building from which the injury resulted were included in any of these leases. If so the failure to keep in repair was that of the tenant who had control of those parts, if not the duty of keeping them in repair was with the lessor. The latter being found to be the fact, the roof and cornice was regarded as a portion of the premises within the control of the lessor, and enjoyed in common by all the tenants, and the lessor was held liable for the injury caused by his failure to keep those parts in repair. See *supra*, II, b, 5, H.

(3) **Fall of Snow and Ice from Roof.**—A class of cases in which the authorities are involved in considerable conflict as to the liability of the lessor, is that in which injury is caused to a person lawfully on the highway by a fall of snow or ice from a roof of such a shape that in certain seasons the accumulated snow and ice would naturally slide and fall into the highway. Where the roof is under the control of the landlord, as where there are several tenants in the building and the roof is not included in the portion leased to anyone, but remains under the general supervision of the landlord, the lessor is of course liable if by reasonable care the fall of the accumulated ice, etc., could be prevented: *Shipley v. 50 Associates*, 101 Mass. 251, 3 Am. Rep. 346; *S. C.*, 106 Mass. 194, 8 Am. Rep. 318. In such a case it is the duty of the landlord who has control of the roof to use reasonable care in the management of that portion of the premises. It is, therefore, immaterial so far as the result is concerned whether his liability be predicated upon the erection and maintenance of a nuisance by building and renting a structure with a roof of such a shape, or whether his liability results from negligence in failing to remove the accumulation of snow and ice from the roof under his control and management.

Where, however, the entire premises are leased to one tenant, the landlord reserving no rights and assuming no duties in respect to the management of the roof, the basis of responsibility for the injury becomes important. If it flows from the erection and maintenance of the roof in that shape, the lessor is liable for letting premises with a nuisance thereon. If, on the other hand, the liability flows from the failure to remove the accumulated snow and ice—from the manner of managing the property—the tenant alone is responsible, since the lessor has relinquished entire control to him. Which of these is the proper theory is a question with reference to which the authorities are in sharp conflict.

In the report of *Shipley v. 50 Associates*, 101 Mass. 251, 3 Am. Rep. 346, the court held it to be immaterial which view was proper, since, as we have seen, either view would render the lessor liable. He both erected and controlled the roof. In the later report of the same case (106 Mass. 194, 8 Am. Rep. 318), however, the lessor's liability was placed upon the ground that the lessor had no right to construct the roof as he did. "It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to a party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will inevitably at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience, and no other proof of negligence on his part is needed."

Subsequent cases in Massachusetts do not, however, take the same view, and where the question has been directly presented as to the liability of a lessor who lets a house with such a roof, relinquishing all control during the term of lease, his liability has been denied: *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76 (in this case there was also a covenant by the lessee to repair, and as is said in *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620, "the ground of decision is not very clearly set forth, but it would seem that the defendant was discharged because the injury was attributable to the negligence of the tenant instead of to any defect in the house, or if there was any defect because it was for the tenant alone under the lease to remedy it"); *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, 15 N. E. 84. In the case last cited it was said by Mr. Justice Holmes: "The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof or took other steps to prevent it. But so far as appears, the tenant could have done so by using reasonable care. If he could it was his duty to do so, and the landlord was not liable, for the reasons we have stated." In other words, the injury is deemed to result from a negligent management of the premises, "and the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way." The same view is taken in Maine: *Lee v. McLaughlin*, 86 Me. 410, 30 Atl. 65.

This theory is not, however, uniformly accepted. In Minnesota and in New York it is held that the liability results from the building of a roof of that shape and not from negligence in its management. "The very act of maintaining a building with a roof constructed as this was, so that snow and ice collecting on it would naturally

fall into the adjoining highway, is a nuisance, and constitutes negligence per se, for which the owner will be liable to anyone injured thereby while lawfully passing along the sidewalk. The law gives a man no more right to construct a building in this way than it does to purposely throw snow and ice upon passers-by. . . . It was not a question of defendant's reasonable care in the management of his roof, but of his right to erect and maintain it at all in that shape. It would not avail him to say that he did all that he could to prevent the consequences; he had no right at all to build it in that way. His act was an attempt to extend his right as proprietor beyond the limits of his own property, at the expense of the safety of the traveling public. He was bound at his peril to keep the ice and snow that collected on his own roof within his own limits; and if the shape of his roof is such as necessarily or naturally to throw it upon the street, he is responsible for all damages, precisely as if he under the same circumstances threw it upon the property of an adjacent owner": *Hannem v. Pence*, 40 Minn. 127, 12 Am. St. Rep. 717, 41 N. W. 657. To the same effect, see *Walsh v. Mead*, 8 Hun, 387.

The question is an interesting one, and one upon which the authorities are about equally divided. The view of the Minnesota and New York courts seems, however, preferable on principle.

(4) **Ice on Sidewalk.**—Where the injury to a third person on the highway in front of the leased premises is occasioned by smooth ice which has accumulated there, it has been held that the owner is not responsible to the injured party. The duty to keep the streets clear of snow and ice rests upon the municipality, and this duty, it is held, cannot, as to third persons, be shifted to the owner of the abutting property. This was held in a case in which the duty of control and management of the sidewalk, as between lessor and lessee, was found to rest with the lessor. Nevertheless, he was held not liable to third persons injured since, as above stated, the duty as to them to keep the streets safe rested not upon the owner but upon the municipality: *Kirby v. Boylston Market Assn.*, 14 Gray 249, 74 Am. Dec. 682. See, also, *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358 (reversing *Wenzler v. McCotter*, 22 Hun, 60), and note to *Decker v. Scranton City*, 31 Am. St. Rep. 759.

Where the question has been considered with reference to the existence of a tenancy in the abutting property, the duty of removing such accumulations of ice is held to rest with the lessee and not with the lessor. In *Shindlebeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584, the ice was caused by the freezing of water projected from a gutter which had become choked up. It was held that, it not being shown that the defect existed at the time of the lease, the duty to keep the gutter in repair or to remove the ice rested upon the tenant, and not upon the landlord, and the latter was not, therefore,

responsible for the former's failure to perform this duty. In *Gardener v. Rhodes*, 114 Ga. 929, 41 S. E. 63, a ditch was so constructed at the time of the lease that if used in winter as a drain ice would form upon the sidewalk. It was nevertheless held that the lessor was not liable for injuries to a person on the highway who fell upon ice so formed, the court regarding the use of the drain in winter as a misuse of the property in a manner not contemplated by the lessor, and the duty of removing the obstruction thus caused rested, it was held, upon the lessee.

(5) **Areas, Cellarways, etc., in Sidewalk.**—In accordance with the general principle that one who demises premises with a nuisance upon them is deemed to authorize its continuance, and becomes liable for its consequences, a lessor is liable for injuries suffered by a person lawfully on the highway who falls into a hole or area in the sidewalk unprotected by a guard or railing at the time of the lease. Such a structure is manifestly a nuisance, and if the owner sees fit to demise the premises without first taking steps to remove this danger, he is plainly responsible if during the period of the lease a stranger is injured thereby: *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800, affirming 28 Ill. App. 142; *Larne v. Farren Hotel Co.*, 116 Mass. 67; *Huesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *McGrath v. Walker*, 64 Hun, 179, 18 N. Y. Supp. 915; *Davenport v. Ruckman*, 37 N. Y. 568, affirming 16 Abb. Pr. 341, 23 N. Y. Super. Ct. (10 Bosw.) 20; *Brown v. Weaver (Pa.)*, 5 Atl. 32.

The same principle applies where although the area or excavation was guarded, the rails or other means of protection were at the time of the lease so defective as to be insufficient or insecure. If, during the time of the lease, the defect causes injury to a stranger on the highway, the lessor is liable: *Borman v. Sandgren*, 37 Ill. App. 160; *Durant v. Palmer*, 29 N. J. L. 544.

(6) Coal Vaults in Sidewalk.

(a) **General Principles.**—So if at the time of the lease there is an excavation or vault under the sidewalk covered by a grating or cover which is then defective, the same rule applies, and the land owner who permits the property in this condition to pass from his control into that of a tenant is liable for any injuries which may thereafter be suffered by a stranger in consequence of such defect: *Stephani v. Brown*, 40 Ill. 428; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *East End Imp. Co. v. Sipp*, 14 Ky. Law Rep. 924; *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841; *Mancuso v. Kansas City*, 74 Mo. App. 138; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Matthews v. De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; *Anderson v. Dickie*, 24 N. Y. Super. Ct. (1 Rob.) 238; *Whalen v. Gloucester*, 6 Thomp. & C. 135, 4 Hun, 24; *Mellvane v. Wood*, 2 Handy (Ohio), 166; *Gandy v. Jubber*, 5 Best

& S. 78, 33 L. J. Q. B., 151, 10 Jur., N. S., 652, 9 L. T. 800, 52 Week. Rep. 526. For the liability of the lessor in this connection where he buys property subject to a lease and with a nuisance thereon, see *Weram v. Noble*, 41 Hun, 398, and monographic note to *Leahan v. Cochran*, 86 Am. St. Rep. 508-523. Where the lessee agrees to make all necessary repairs, see as to the effect of such covenant upon the responsibility of the lessor, *supra*, II, b, 5, M.

If, however, the grating or cover to such a vault was properly constructed and in good repair at the time of the lease, the landlord relinquishing all control of the premises, he is not liable if through the negligence of his tenant or a third person the cover is left off the hole or insecurely fastened, and a stranger passing along the highway sustains injuries in consequence. Landlords are not obliged to see that the covers on coal-holes in premises which are in the occupation of a tenant are kept securely fastened": *Frishberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086. To the same effect, *Rider v. Clark*, 132 Cal. 382, 64 Pac. 564; *Stewart v. Putnam*, 127 Mass. 403; *Gordon v. Peltzer*, 56 Mo. App. 599; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Trustees v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971; *Schroeck v. Reiss*, 46 App. Div. 502, 61 N. Y. Supp. 1054; *Adams v. Fletcher*, 17 R. J. 137, 33 Am. St. Rep. 859, 20 Atl. 263. (Compare *Folsom v. Lewis*, 85 Ga. 146, 11 S. E. 606.) As to the lessor's liability in this regard, where the premises are leased not to one but to several tenants, see post this division, subdivision (c).

(b) Necessity and Effect of License from Municipality to Construct.—Where a municipal ordinance expressly requires that authority for the construction of vaults, etc., under a sidewalk shall be obtained from the municipal authorities, and specifies the manner in which they shall be constructed, a vault constructed without first obtaining authority and in a manner violative of the law is a nuisance, and the owner and lessor of the property is responsible for any injury to a stranger which it occasions, although the defect causing the accident appears after the lease is made: *Owings v. Jones*, 9 Md. 117. See, also, *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066.

On the other hand, if such vaults are well constructed under municipal authorization, and in the manner required by law, they are not nuisances, and if at the time of the demise are in good condition, the lessor is not responsible for injuries arising from the failure of the lessee to keep them in proper repair and covered: *Rider v. Clark*, 132 Cal. 382, 64 Pac. 564; *Gridley v. City of Bloomington*, 68 Ill. 47; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439, reversing 94 Ill. App. 333; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188; *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N.

E. 971; *Bobbage v. Powers*, 54 Hun, 635, 7 N. Y. Supp. 306, affirmed 130 N. Y. 281; *Curran v. Flammer*, 49 App. Div. 293, 62 N. Y. Supp. 1061; *Irvin v. Fowler*, 28 N. Y. Super. Ct. (5 Rob.) 482. In *Whalen v. Gloucester*, 4 Hun, 24, 6 Thomp. & C. 135, 4 Hun, 24, the language of the court indicates that in its view the owner of leased premises which have a coal vault in the sidewalk appurtenant to them is liable almost as an insurer, although the vault was constructed with authority and was secure at the time of the lease. If such be the idea intended to be expressed, it is obviously a dictum, and unsupported by the other New York cases. (See those above cited.)

Although express authority may not have been given by the municipality originally, consent and license may, it is well settled, be implied from long acquiescence of the municipal authorities, and for the purpose now under consideration a license so implied is the equivalent of an original authorization: *Gridley v. City of Bloomington*, 68 Ill. 47; *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132 (affirming 54 Hun, 635, 7 N. Y. Supp. 306), and cases there cited; *Irvin v. Fowler*, 28 N. Y. Super. Ct. (5 Rob.) 482.

Where, however, a vault under the sidewalk, although not constructed in violation of express statute, has yet not been constructed under municipal authority, either express or implied from long acquiescence by the municipal authorities, there is a decided conflict as to the liability of a lessor of premises to which such a vault is appurtenant.

According to the view of the New York courts, one who without license from the municipal authorities makes an excavation in or under the sidewalk of a street without license from the municipal authorities is a trespasser and the excavation is a nuisance. On this ground of nuisance, therefore, and although shown to be guilty of no negligence, he may be held liable for a defect arising from its original construction, although the premises were at the time of the accident in the possession of his tenants: *Congreve v. Smith*, 18 N. Y. 79. In a case arising out of the same accident this doctrine and the lessor's liability was extended to cover an injury received by a stranger during the term of lease, although no negligence and no defect of original construction was shown, the court saying: "The liability of the defendants does not depend upon their negligence either in providing an unsuitable stone or in continuing the use of it after it had become unsuitable from any cause, but from the fact that the stone was unsafe at the time the injury occurred, and thereby occasioned the injury": *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495. Under this view, therefore, a lessor of premises with an unauthorized coal vault appurtenant thereto is responsible although

at the time of the lease the vault is secure, and the real cause of injury to a third person is the lessee's failure to repair. Compare, also, *Burke v. Schwerdt* (Cal.), 6 Pac. 381. See, further, as illustrating the position of the New York courts with reference to excavations, vaults, etc., made without municipal authorization, and the liability of a lessor for injuries therefrom, *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971; *Anderson v. Dickie*, 24 N. Y. Super. Ct. (1 Rob.) 238; *Irvin v. Wood*, 27 N. Y. Super. Ct. (4 Rob.) 138; *Irvin v. Fowler*, 28 N. Y. Super. Ct. (5 Rob.) 482. See, also, *Halroyd v. Sheridan*, 53 App. Div. 14, 65 N. Y. Supp. 442 (barn door swinging over sidewalk). The view that unless authorized by the municipality such excavation or vault is a nuisance, and the lessor is liable for its consequences seems also to be adopted in Illinois: *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439.

This theory that an authorization, express or implied, from the municipality is essential to relieve a vault under the sidewalk from being deemed a public nuisance is not generally accepted, and so far as the cases involving, in this connection, the liability of lessors are concerned, outside of the two states already mentioned (New York and Illinois), the authorities seem uniform in holding no such authorization necessary in the absence of statute. Whether such a vault is a nuisance or not depends upon whether it is properly constructed and kept in repair, and if, according to this view, the vault was thus constructed and in repair at the time of the lease, the lessor is not responsible for injuries resulting from the failure of the lessee to keep it in repair: *Fisher v. Thirkell*, 21 Mich. 4 Am. Rep. 422; *Gordon v. Peltzer*, 56 Mo. App. 599; *King v. Thompson*, 87 Pa. St. 365, 30 Am. Rep. 364; *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, 20 Atl. 263. See, also, *Rider v. Clark*, 132 Cal. 382, 64 Pac. 123; *City of Boston v. Gray*, 144 Mass. 53, 10 N. E. 509; *City of Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Johnson v. McMillan*, 69 Mich. 36, 36 N. W. 803.

(c) **Where Under Control of Lessor.**—If the premises be leased to several tenants, each occupying a separate portion, to no one of which the cellarway, coal vault, etc., is exclusively appurtenant (as in the case of an apartment-house), it is regarded as a portion of the premises used in common, and the landlord is therefore in law, as he usually is in fact, regarded as having the control and duty of supervision with respect to it. If, in such a case, he permits the excavation to remain unguarded, or fails to keep the cover or guards in proper repair, he is liable to a stranger lawfully on the highway who is injured in consequence of such neglect: *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459, 15 N. E. 424; *Anderson v. Caulfield*, 60 App. Div. 560, 69 N.

Y. Supp. 1027; *Sturmworld v. Schreiber*, 74 N. Y. Supp. 993, 69 App. Div. 476.

In *Martin v. Pettit*, 117 N. Y. 118, 22 N. E. 566, reversing *Wasson v. Pettit*, 49 Hun, 166, 1 N. Y. Supp. 613, it appeared that notwithstanding the diligence of a watchman, whom defendant, the owner of a building undergoing repairs, had employed to watch the outside of the building, some person had removed an iron grating which covered a cellarway, and plaintiff had suffered injuries by falling into the cellarway. The court held that the complaint not having alleged the maintenance of a nuisance by the defendant, he could only be held liable by proof of negligence on his part, and no negligence having been shown, the plaintiff could not recover.

When an area, cellarway or coal vault in a sidewalk is exclusively appurtenant to a part of the premises occupied by one tenant, and is used by him alone, it is held by the weight of authority that upon such tenant, and not upon the lessor, lies the duty of its supervision and repair, although the owner retains control or leases to other tenants the remainder of the building. "If the coal-hole and vault were constructed and were used for the benefit of the entire premises, the leasing of a portion, only, of the premises would not absolve the owner from his duty to use ordinary care to keep the coal-hole and the covering thereto in a good and safe condition; but if the vault into which the coal-hole opens has no connection with any other part of the building than the basement leased to the tenant, and no benefit inures from it to any other part of the premises, and the tenant, as against the owner, has, and is entitled to have, exclusive possession and control of the basement, coal-hole and vault, and has covenanted to keep the same in good repair, then the case should be regarded as within the general rule that the occupant of the premises, and not the owner thereof, is responsible for injuries received in consequence of a failure to keep the premises in repair": *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439. See, also, *City of Boston v. Gray*, 144 Mass. 53, 10 N. E. 509; *Schroeck v. Reiss*, 46 App. Div. 502, 61 N. Y. Supp. 1054; *Brown v. Weaver* (Pa.), 5 Atl. 32.

In *Trustees of Village of Canandaigua v. Foster*, 156 N. Y. 354, 66 Am. St. Rep. 575, 50 N. E. 971, on the other hand, it is held that notwithstanding the area, cellarway, vault, etc., are exclusively used by one tenant, if the landlord retains possession of any part of the building, he is liable for failure to keep such vault, etc., in repair. "Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in good repair, which otherwise rests on the owner of the fee. . . . If he transfers either title or possession in part only, he does not escape the burden. . . . Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the

safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk." This criterion of liability is purely arbitrary, and it may be doubted whether, as the court claims, it is "required by sound public policy."

(7) **Immaterial Whether Defect is on or Adjacent to Highway.**—In considering the liability of a lessor for injuries suffered by third persons through defective or unguarded grates, it is immaterial whether, as a matter of fact, such structures are in the highway or are on the leased premises, and so near the highway as to constitute a nuisance. An owner of property may so construct his premises as to make them, for all practical purposes, a part of the highway, and it is, in such case, immaterial whether the structure causing the injury is within the official street line or not. It is for practical purposes in the highway: *Tomle v. Hampton*, 129 Ill. 379, 21 N. E. 800, affirming 28 Ill. App. 142; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, 39 Am. Rep. 503.

P. Statutory Provisions.—Where a statute makes an "owner or occupant" of premises on which filth, or any other cause of sickness, is found liable to a penalty and to the expenses of removing such nuisance, if he himself does not do so after notice, the effect of the statute is to change the common law (see *supra*, 524), in that he becomes responsible, although the tenant alone created the nuisance: *City of Bangor v. Rowe*, 57 Me. 436.

By section 3118 of the Civil Code of Georgia, it is provided that "the landlord, having fully parted with possession and rights of possession, is not responsible to third persons for damages resulting from the negligent or illegal use of the premises by the tenant. But he is responsible to others for damages arising from defective construction, or for damages from failure to keep the premises in repair." The section is not clear in its expression, but it was held, in *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204, to be a mere codification of previous decisions in that state, and that, under it, the lessor was not liable to a servant of the lessee for injuries resulting from his failure to repair, where he neither knew, or in the exercise of reasonable diligence should have known, of the need of repairs.

The Louisiana statute (R. C. C., arts. 670, 2322), making it the duty of the owner of a building to prevent injuries to passers-by or neighbors by the fall of his building or a part thereof, and making him liable for his neglect to keep them in sufficient repair to prevent this, binds a lessor although he has no actual knowledge of the need of repair: *Barnes v. Beirne*, 38 La. Ann. 280 (*supra* 537); but is not applicable where the injury is to a tenant or his guests, and not

to "neighbors or passengers": *McConnell v. Lemley*, 48 La. Ann. 1433, 55 Am. St. Rep. 319, 20 South. 887.

In California Civil Code, section 1941, it is provided that "the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenable," etc. It is held, however, that the liability imposed upon the lessor by this section is limited by the privilege conferred upon the tenant by the following section (Civ. Code, sec. 1942), enabling him to either vacate the premises or to expend the value of one month's rent in repairs. The lessor is not, therefore, liable because of these sections to an employee of the tenant for the defective condition of the premises when let: *Angevine v. Knox-Goodrich* (Cal.), 31 Pac. 529; or for his failure to repair them: *Willson v. Treadwell*, 81 Cal. 58, 22 Pac. 304.

For cases upon the liability of a lessor of a building for injuries to third persons, received from a lack of fire-escapes, where a statute requires such appliances, see *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Lee v. Smith*, 42 Ohio St. 458, 51 Am. Rep. 839; *Keeley v. O'Connor*, 106 Pa. St. 321; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201. Under statutes requiring guards, etc., for elevator shafts: *Mallory v. New York Real Estate Assn.*, 13 Misc. Rep. 496, 34 N. Y. Supp. 679; *Weinberger v. Kratzenstein*, 71 App. Div. 155, 75 N. Y. Supp. 537; *S. C.*, 35 Misc. Rep. 74, 71 N. Y. Supp. 244.

III. Liability of Bailor, Lessor, etc., of Personal Property.

a. **For Acts of Lessee.**—The relation of bailor and bailee, like that of landlord and tenant, is not one which involves any element of agency, and the doctrine respondeat superior is in no respect applicable. "In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee with respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries, nor are the servants of the bailee the servants of the bailor, or in any sense acting for him, and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other": *New York etc. Ry. Co. v. New Jersey Elec. Ry. Co.*, 60 N. J. L. 338, 38 Atl. 828.

If, therefore, one hires out a horse to another, and by the negligence of the driver the person or property of a third person is injured, the owner of the horse cannot be held responsible for such injuries: *Thompson v. New Orleans etc. R. Co.*, 10 La. Ann. 403; *Herlihy v. Smith*, 116 Mass. 265. Where the negligence is that of

a driver whom the bailor has furnished, the latter is of course responsible, not, however, on the ground of bailment, but because of the relation of master and servant existing between himself and the negligent driver: *Crockett v. Calvert*, 8 Ind. 127.

On the same principle it has been held in a number of cases that the lessor of a ferry is not liable for injuries to the persons and property of third persons arising from the negligence of the lessee. "The lessee, for the time being, takes the place and assumes the duties and obligations of the lessor. He acts independently of him. He cannot be controlled by him. . . . The servants of the lessee are not his (lessor's) servants. He cannot control them. He cannot give them orders which they are bound to obey. They owe no allegiance or service to him. Having no power over them and having conferred no authority upon them, he is not responsible for their acts. He stands in no relation to them which makes applicable to him the maxim *respondet superior*": *Norton v. Wiswall*, 26 Barb. 318. See, to the same effect, *Ladd v. Chatard*, Minor (Ala.) 366; *Taylor v. Rushing*, 2 Stew. (Ala.) 160; *Claypool v. McAllister*, 20 Ill. 504; *Blackwell v. Wiswall*, 24 Barb. 355; *Briggs v. Ferrel*, 34 N. C. 1; *Hale v. Dutant*, 39 Tex. 667; *Felton v. Deall*, 22 Vt. 170, 54 Am. Dec. 1.

In *Hale v. Dutant*, 39 Tex. 667, the defendant was sued for injuries received by plaintiff, who, while traveling on a public highway, fell over a rope used in working a ferry of which defendant was an owner, and which was stretched across the highway. A plea that, before the accident, the ferry had been leased to a third party was held a good defense to the action. The court states that the "defendants are sued as common carriers, and this is what, at common law, would have been an action on the case for incidental damages." Aside from the theory of the pleadings, however, it would seem that if the rope across the highway was a part of the original construction of the ferry, and was there at the time of the demise, it would amount to a public nuisance, and a lease of the ferry in that condition would be deemed an authorization by the defendant of a continuance of the nuisance, and would make him responsible for the consequences.

b. Defects in Appliances (Chattels) Bailed, Leased, etc.

1. Basis of Liability.

A. In General.—In the principal case (*Griffin v. Jackson Light etc. Co.*, 128 Mich. 653, ante, p. 496, 87 N. W. 888), the facts which were treated as giving rise to a "letting of property for use" were that an electric lamp had been placed, by an electric lighting company, on the premises of a customer for the purpose of giving light from a current of electricity furnished by the company. Defective insulation, known to the customer (who used it nevertheless), occasioned

injury to a person delivering merchandise to the customer. The court held the case to be within the general rule that "one who lets property for use, like one who sells it, is not responsible to third parties injured by reason of a defect in the article or property let or sold," and said that if the case came within an exception to this general rule, where the defendant is dealing with a dangerous substance, still there was here an intervening human agency (the customer), which might have arrested the injury or furnished protection, and defendant was not, therefore, liable.

The case, while peculiar in the facts, is closely akin to, and was decided upon principles equally applicable to, that class of cases in which a person who has contracted with another to supply the latter with appliances for a particular purpose, where the contract is not one of sale, is sought to be held responsible to a third person for injuries received by the latter by reason of a defect in such appliances. These cases, however, are but instances of the application to one class of facts, of principles concerning which there has been much discussion, and the proper limitations of which are by no means well settled. The larger question is well stated by Brett, M. R., in *Heaven v. Pender*, L. R. 11 Q. B. D. 503, to be: "What is the proper definition of the relation between two persons other than the relation established by contract or fraud, which imposes on one of them a duty toward the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property?" An extended discussion of this question is, of course, outside the scope of this note, and no more will be here attempted than to consider the liability of one who furnishes appliances to another under a contract of lease, bailment, etc., for an injury to a third person arising from a defect in the appliance furnished.

B. No Privity of Contract.

(1) **In General.**—There is, of course, in such case no privity of contract between the parties, and whatever right of action accrues to the person injured must be based on some ground other than that of breach of contract. The only contract into which the defendant has entered is that with the person to whom he has agreed to let or furnish the appliances, and to this contract the third person injured is not a party. Whatever his liability, it is not one to which privity of contract is an essential: *Griffin v. Jackson Light etc. Co.* (principal case), 128 Mich. 653, ante, p. 496, 87 N. W. 888; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Burke v. De Castro etc. Ref. Co.*, 11 Hun, 354; *Wright v. Delaware etc. Canal Co.*, 40 Hun, 343; *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523, affirmed 146 N. Y. 363, 41 N. E. 88; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418; *The Mary Stewart*, 5 Hughes, 312, 10 Fed.

137; *The Dago*, 31 Fed. 574; *Anderson v. The Ashebrooke*, 44 Fed. 124; *Blackmore v. Bristol etc. R. Co.*, 8 El. & B. 1035.

(2) **Where Plaintiff is Servant of Lessee.**—In most of the cases cited the person injured was a servant of the person with whom the defendant had contracted to furnish the appliances. This, however, does not, it is quite uniformly held, create as between the defendant lessor or bailor and the third person any privity of contract such as the relation of master and servant. If, for instance, the person injured is the employé of a stevedore, who contracts with the owner of a vessel to load or unload it, the fact that the appliances of the vessel are to be used in the unloading does not make the person injured the servant of the owner: *Pingree v. Leland*, 135 Mass. 398; *Reier v. Detroit Steel Works*, 109 Mich. 244, 67 N. W. 120; *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. 112. Compare, however, *Fell v. Rich Hill Coal Co.*, 23 Mo. App. 216.

(3) **No Recovery for Breach of Contract.**—Where, therefore the breach of contract is made the basis of an action brought by the person injured, who was not a party to the contract of bailment or lease, there can obviously be no recovery. Accordingly, where recovery is sought, on the ground that the plaintiff was a servant of the defendant, if the proof shows that he was in fact the servant of one to whom the defendant stood in the position of an independent contractor or lessor, the plaintiff cannot recover: *Pingree v. Leyland*, 135 Mass. 398; *Reirer v. Detroit Steel Works*, 109 Mich. 244, 67 N. W. 120. In the latter case the court admits that "on a proper declaration," the defendant might be held liable for failure to furnish suitable machinery or (where such was its duty) to keep it in repair on due notice.

In *Winterbottom v. Wright*, 10 Mees. & W. 109, a frequently cited case, the defendant had contracted with the postmaster general to furnish and keep in repair a mail coach along a certain route. Through the weakness of the coach a driver was injured, and brought an action against the defendant to recover damages for the injury. The court held that the action could not be maintained, Alderson, B., saying: "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." The case is frequently cited as one which denies all right of recovery to a person who is injured by the negligence of another in furnishing appliances to a third person under a contract with the latter, and the judges evidently regarded the case as one in which the plaintiff was without a remedy (see opinion of Rolfe, B.). Brett, M. R., in his opinion in *Heaven v. Pender*, 11 Q. B. D. 503, 513, however, seeks to distinguish the case as one in which "the declaration relied too much on contracts entered into with other persons than the plaintiff." In the opinion of the master of the rolls, a declaration so framed as to show that the defendant must, as a

reasonable man, have expected the coach to be used by the plaintiff, or one of his class, and the defect to be one which would probably not be observed, would have entitled the plaintiff to a recovery.

C. General Duty of Care not to Injure Others.—That there is no privity of contract between a lessor (or one who furnishes appliances, etc., to another for temporary use) and a third person is not decisive of his liability. To quote again from the opinion of Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503: "If a person contracts with another to use ordinary care or skill toward him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty"; and this latter obligation the author of the opinion thus formulates: "The proposition . . . is that whenever one person is, by circumstances, placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use such care and skill to avoid such danger."

The case in which this general proposition was thus laid down was one in which certain staging, supplied by a dock owner, under contract with a ship owner, for the use of painters who were to paint the ship, broke by reason of a defect in its construction, and injured an employé of the painter, who had contracted with the ship owner to do the painting. The injured person thereupon sued the dock owner. All the judges agreed that the defendant was liable, but Cotton, L. J., in whose opinion Bowen, L. J., concurred, refused to assent to the above-quoted formula of Brett, M. R., in all its generality, but held the defendant liable on the ground that the plaintiff must be considered as having been invited by the defendant dock owner to use the dock and its appliances, and these the defendant was bound to use reasonable care in making safe. The same duty, it was held, extended to articles "supplied by the dock owner for immediate use in the dock, of which control is not retained by the dock owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs." In the course of the opinion, however, Cotton, L. J., observes: "In declining to concur in laying down the principle enunciated by the master of rolls, I in no way intimate any doubt as to the principle that anyone . . . who without due warning, supplies to others for use an instrument of thing which, to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to

others by reason of his negligent act." See, with reference to this case (*Heaven v. Pender*, 11 Q. B. D. 503), and the exact point of difference between the views of Brett, M. R., and of the other judges, Webb's *Pollock on Torts*, page 535, note (e), in which the dissent of Cotton and Bowen L. JJ., from the broad proposition of Brett, M. M., is said to be justified so far as it "purported to exhibit" the rules governing the duty of occupiers of real property, "as a simple deduction from the general rule as to negligence."

In *Moon v. Northern Pac. Ry. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, the rule is thus laid down: "One may owe two distinct duties in respect to the same thing—one of a special character to one person, growing out of special relations to him; and another of a general character to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty: 1 *Shearman and Redfield on Negligence*, sec. 116; *Bigelow's Cases in Torts*, 614. Subject to proper limitations the rule, generally stated, is that if a reasonable man must see that, if he did not use due care in the circumstances, he might cause injury to the person or property of another entitled to repose confidence in his diligence, a duty arises to use such care."

D. Implied Invitation to Use Appliances.—The courts have, however, ordinarily fought shy of enunciating such general rules, and, in the larger number of cases, the grounds of liability are to be found stated as exceptions to a general rule that one not a party to a contract cannot sue one of the parties thereto for negligence in the performance of such contract. Thus in *Fowles v. Briggs*, 116 Mich. 425, 72 Am. St. Rep. 537, 74 N. W. 1046 (quoted in principal case, *Griffin v. Jackson Light etc. Co.*, 128 Mich. 653, ante, p. 496, 87 N. W. 888), it is said that the only apparent exceptions to this rule are where the defendant failed to keep his premises in a suitable and safe condition, or where the defendant had reserved the right to direct the manner of work, or undertaken to supply the instrumentalities, or where the shipper of a dangerous substance, the character of which was not made known to the carrier, had been held liable.

With especial reference to the subject under consideration in this note, however, the cases in which the liability of a lessor is not based upon some such general rule as we have already discussed, it is ordinarily put upon one or both of two grounds—the first, that of an implied invitation by the lessor to the person injured to use the appliance furnished as a part of the premises; the second, that of a duty owing by one who furnishes another with an instrumentality "imminently dangerous" to the lives of others: See, for instance, *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418.

The first of these grounds, viz., that the defendant impliedly invited the plaintiff to use the appliance furnished by him (defendant) under contract with a third person, is very evidently the ground upon which the decision in *Heaven v. Pender*, L. R. 11 Q. B. D. 503 (re-

versing 9 Q. B. D. 302), is placed by the majority of the court. "When ships were received into the dock for repairs, and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business, in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that, at the time the appliances provided for immediate use in the dock were provided by him, they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed." Brett, M. R., regarded the duty owed by an owner or occupier to persons whom he has "invited" as merely one application of general rule of negligence which he laid down, but the case of *Heaven v. Pender*, 11 Q. B. D. 503, has, by later cases, been "supported simply as a case of invitation by the defendants to come upon their premises without having used reasonable care to be sure that their condition did not subject the person invited to danger": *Smith v. Onderdonk*, 25 Ont. App. To the same effect, see *Marney v. Scott* (1899), L. R. 1 Q. B. 986; *O'Neill v. Everest*, 61 L. J. Q. B., N. S., 453.

This ground of "implied invitation," and the duty to avoid injury to those "invited" to use the defective appliances, is most frequently applied where the person injured is a servant or employé of the person with whom the defendant contracted to furnish the appliance. If, for instance, a scaffold is erected or a derrick is bailed to another to enable him and his workmen to perform work upon the scaffold, or with the engine, the owner of the appliance is said to thereby "invite" the workmen upon it, and to hold out to them that reasonable care has been used to make it safe: See *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Hayes v. Philadelphia etc. Iron Co.*, 150 Mass. 457, 23 N. E. 225; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Smith v. London Docks Co.*, L. R. 3 Com. P. 326; *Marney v. Scott* (1899), L. R. 1 Q. B. 986.

The results of a strict adherence to this rule, and of the exclusion of liability to any but those who may be said to have been invited, are shown in *Blakemore v. Bristol etc. Ry. Co.*, 8 El. & B. 1035. It appeared that the defendant railway company had a crane, which they permitted consignees to use in removing freight from the cars. One H., having been notified to remove certain stone consigned to him, applied to the company, with two servants, and, aided by some servants of the company, proceeded to use the crane. Finding the load too heavy, one of his servants called to B. to help, and, while B. was helping, the chain gave way, and B. was killed. The court held that B. was to be regarded as the servant of H., and that the

crane was being used at the request of the company, but held that B. was not one of the men whom the company had contemplated as using it. *Cotton, L. J., in Heaven v. Pender, L. R. 11 Q. B. D. 503, 515*, doubted whether B. was properly regarded as a volunteer under the facts stated, but approved of the doctrine that if there was no implied request or invitation to him to use the crane, the defendant company was not liable.

That the lender, lessor, etc., of appliances should be liable to those whom he invites, expressly or impliedly, to use the appliance furnished by him, is undoubted. It may, however, be doubted whether the liability should be limited by this, and it would seem that as to lessors of chattels intended to be used by others, the view of Brett, M. R., in *Heaven v. Pender, L. R. 11 Q. B. D. 503*, that these cases of invitation involve but a "minor proposition"—are but applications of a more general rule—is the proper view. The defendant is, of course, not chargeable with negligence except as to persons whom he might properly expect would use the appliance or be affected by it. But the test should "be found in the probable injurious consequences to be anticipated" (*Pennsylvania R. R. Co. v. Snyder, 55 Ohio St. 342, 60 Am. St. Rep. 703, 45 N. E. 559*), rather than limited to the particular persons whom the defendant has "invited" to be affected by it. It is, of course, assumed in what is said above, that the plaintiff was where he had a lawful right to be, and that his use of the appliance furnished by the defendant was proper and lawful.

E. "Imminently Dangerous" Nature of Appliance.—The other ground referred to is that of the liability of one who furnishes to another, for use, an article "imminently dangerous," where serious injury to any person using it is the natural and probable consequence of its use: *Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. 418*. In some cases, it is stated, as the one ground of exception to the rule, that privity of contract is essential to sustain action for negligence founded on the improper and negligent performance of a contractual obligation. "There is a well-recognized distinction in the law between an act of negligence, which is eminently [imminently (?)] dangerous to the lives of others, and one that is not so. In the former case, the guilty party is liable to any person who sustains an injury by the act, whether there exists any privity between them or not, while in the latter case, the negligent party is liable only to the party with whom he contracted, on the ground that his negligence constitutes a breach of his contract": *Burke v. De Castro & Donner etc. Co., 11 Hun, 354* (said in *Davies v. Pelham Hod Elevating Co., 65 Hun, 573, 20 N. Y. Supp. 523*, to have been overruled in effect by *Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311*). Similar language is to be found in *The Rheola, 7 Fed. 781* (reversed, *19 Fed. 926*). "The liability, therefore, if it exists, does not arise out of the breach of any contract between these parties; and, in such case, the rule seems to be that the owner of the defective

or dangerous article, by reason of the defect in which injury is done, is not liable unless the defective thing is imminently dangerous." Compare, also, *Griffen v. Jackson Light etc. Co.* (principal case), 128 Mich. 653, ante, p. 496, 87 N. W. 888; *Wright v. Delaware etc. Canal Co.*, 40 Hun, 343; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400; *The Mary Stewart*, 5 Hughes, 312, 10 Fed. 137; *Smith v. Onderdonk*, 25 Ont. App. 171.

Without stopping to consider separately the doctrine of each of these cases, it may be said that in all liability is placed upon the ground of negligence. It is not the doctrine of *Fletcher v. Rylands*, L. R. 3 H. L. 330, that one who collects a dangerous agency does so at his peril, and liability for resultant damage can only be avoided by proof that the injury was caused by plaintiff's negligence, or by an act of God, etc. The cases above considered involve no such idea, but hold the lettor liable only when he is shown to have been negligent. It would seem, therefore, that here again is but a "minor proposition"—an application of a general rule to a particular class of cases. One who lets an appliance or machine "imminently dangerous" is, of course, bound to use reasonable care to avoid such danger. But, so far as these cases make a distinction between an instrument "inherently dangerous," and any other, with respect to the necessity of using reasonable care, or so far as they regard the former class as the only one in which privity of contract is not essential to recovery, they seem unsustainable on principle. Reasonable care would, undoubtedly, amount to more where the instrument or appliance is "inherently dangerous or noxious" than where it is not, but it is not perceived why a failure to exercise reasonable care under the circumstances should not give rise to a cause of action in one case quite as much as in the other.

2. Failure to Repair During Term of Letting.—In a number of cases, language is used strongly importing that the duty of one who furnishes an appliance to another for temporary use does not end with originally furnishing a safe article, but extends also to keeping it in repair during the term of the letting: *Johnson v. Spear*, 76 Mich. 139, 15 Am. St. Rep. 298, 42 N. W. 1092; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 357; *Hoffner v. Prettyman*, 6 Pa. Super. Ct. 20; *Anderson v. The Ashebrooke*, 44 Fed. 124. Compare, however, *King v. New York etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37. With reference to this, the duty of the party furnishing the appliances (i. e., the lettor) would seem to depend entirely upon the circumstances of the case, and the extent to which the article which is the subject of the letting remains under the general supervision of the lettor. Ordinarily, and where the sole control of the article let is in the person employing it, the duty of keeping it in repair would seem likewise to rest upon him.

3. Where Lessor does not Select Appliance Furnished.—The liability of the lettor of a chattel to a third person for injuries re-

ceived therefrom is based, as we have seen, upon his negligence in furnishing the defective article. If, however, he does not furnish the article himself, but merely permits the other party to the contract to select some article if he finds any suitable, the lettor is obviously guilty of no negligence with respect to third persons. Thus in *Nugent v. Atlas S. S. Co.*, 51 Hun, 306, 3 N. Y. Supp. 861, affirmed in 61 Hun, 626, 16 N. Y. Supp. 66, affirmed in 147 N. Y. 709, 42 N. E. 724, the defendant company had agreed to furnish a painter with rope for a second tier of staging. The ropes which were offered were unfit, and were rejected by the painter, whereupon a servant of the defendant told him to use any rope he could find. The painter selected one which proved unfit, and injured plaintiff, an employé of the painter. It was held that plaintiff could not recover, the remark of defendant's servant not amounting to a suggestion that any particular rope was fit or safe, and the negligence, therefore, being that of the painter.

So in *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523, affirmed in 146 N. Y. 363, 41 N. E. 88, it was held that where a person was killed by a defective rope, which he had himself selected and ordered, put in a derrick in place of an iron rope, which was there at the time of the letting, no recovery could be had for his death: See, also, *Mulcahy v. Floating Drydock Co.*, 8 Daly (N. Y.), 93; *McGill v. Bowman*, 18 Sc. Sess. Cas., 4th ser., 206.

In these cases, the part which proved defective was not of the defendant's selection. When, however, the defective article was supplied by the defendant, the fact that other changes were made by another person is immaterial. If, for instance, lighter rigging is substituted by a stevedore for the rigging furnished by the ship, but the new arrangement causes no unusual strain on the gear furnished by the ship, such substitution cannot bar an action by an employé of the stevedore injured by the breaking of the gear furnished by the ship: *Steel v. McNeil*, 60 Fed. 105.

4. **Improper Use of Appliances by Lessee.**—A lettor is not responsible to third persons for injuries received, not from any defect in the chattel furnished, but from its improper use by the person to whom it is furnished. The manner of use of the article by the person to whom it is let is a matter beyond the control of the lettor, and with which he is not properly chargeable: *Central Ry. Co. v. O'Hara*, 46 Ga. 417 (improper use by contractor of car and trestle furnished by railway company); *Reier v. Detroit Steel etc. Works*, 109 Mich. 244, 67 N. W. 120 (bursting of emery wheel [property of defendant] from excessive speed at which it was operated by a contractor); *The Mary Stewart*, 5 Hughes, 312, 10 Fed. 137 (breaking of rope improperly used with single pulley by stevedore); *The Kensington*, 91 Fed. 981 (where, though tackle furnished by ship was proper and safe, the load was not enough to draw the sling tight, and part of the load fell).

5. **When Negligence of Lessor is the Proximate Cause of the Injury.**—In order that the lessor may be liable to a third person, the negligence of the former must have been the proximate cause of the injuries of the latter. In the principal case, it is said that so far as concerns those cases where the defendant is dealing with a dangerous substance, "the limitation of the rule, as we understand it, is that there shall be no intervening human agency which might have arrested the injury or furnished protection." Accordingly, it was there held that the defendant lighting company was not responsible to injuries to a third person from defective insulation of an electric lamp, where the person in whose place of business the lamp was knew of its condition, but used it, nevertheless: *Griffin v. Jackson Light etc. Co.*, 128 Mich. 653, ante, p. 496, 87 N. W. 888.

On the other hand, it is held that where two railroads connect, and the cars of one are received and used upon the line of the other, while a duty of inspecting them, to see that they are safe, rests upon both of the lines, if the transmitting company fails to inspect, and an injury occurs to an employé of the connecting line, it is no answer to an action against the transmitting company that the receiving company also failed to inspect, and that if it had made the proper inspection, the defect would have been discovered, and the injury avoided. In order to relieve the first wrongdoer, there must intervene between him and the plaintiff an independent, responsible agent, breaking the causal connection": *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679. But the failure of the second company to inspect a car furnished it for use by the first company without inspection cannot, with propriety, be said to have broken the causal connection between the negligence of the first company and the injury. The most that can be said is that it failed to cure the previous negligence of the first company: *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559. To the same effect, *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679. (Compare *Missouri etc. Ry. Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, and cases cited; *Fowles v. Briggs*, 116 Mich. 425, 72 Am. St. Rep. 537, 74 N. W. 1046.)

6. Instances.

A. Staging, Scaffolds, etc.—A frequent application of the principles above discussed is where one person contracts to furnish another with staging or scaffolding for the prosecution of certain work, and third persons, usually employés of the person agreeing to do the work, are injured by a defect in the construction of the staging chargeable to negligence. In such a case the authorities uniformly hold that the person furnishing the staging is bound to use due care to make it safe for the persons whom he must know are to work upon it; and for negligence in this regard, he is liable to the person injured. In some of the cases this is put upon the ground that the defendant impliedly invited such workmen to use the staging, and

was, therefore, bound to exercise reasonable care to make the premises safe; in others, upon the doctrine that a defective scaffolding is an article "imminently dangerous," and in many both reasons are given: See *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Coughtrey v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Cook v. New York Floating Drydock Co.*, 1 Hilt. (N. Y.) 436; *Hoffner v. Prettyman*, 6 Pa. Super. Ct. 20; *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418; *Heaven v. Pender*, L. R. 11 Q. B. D. 503, reversing 9 Q. B. D. 302. See, also, *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. Compare *Delberner v. Rogers*, 66 How. Pr. 35.

B. Hoisting Apparatus—Ship's Tackle, etc.—Another case of quite frequent occurrence is that in which the tackle, etc., of a vessel are furnished by the owners to a stevedore to unload the vessel under a contract. Where the owners of the vessel are chargeable with negligence in furnishing defective or unsuitable tackle for the use intended they are responsible to an employé of the stevedore who is injured in consequence: *The Rheola*, 19 Fed. 926; *The Carolina*, 30 Fed. 199, affirmed in 32 Fed. 112; *The Pheonix*, 34 Fed. 760; *Anderson v. The Ashebrooke*, 44 Fed. 124; *Steel v. McNeil*, 60 Fed. 105, 8 C. C. A. 512, affirming *The Para*, 56 Fed. 241; *The Elton*, 83 Fed. 519, 31 C. C. A. 496. In *The Mary Stewart*, 5 Hughes, 312, 10 Fed. 137, and *The Rheola*, 7 Fed. 781 (reversed in 79 Fed. 926), liability on the part of the vessel in such case is denied on the ground that the tackle of a vessel is not an article "imminently dangerous," and, in the absence of priority of contract, there could be no recovery. These cases are, undoubtedly, erroneous.

The liability of the vessel owner is, however, dependent upon proof of negligence. He is not to be held responsible for injuries arising from latent or other defects which an examination would not disclose, or where due diligence and care has been used: *Riley v. State Line S. S. Co.*, 29 La. Ann. 791, 29 Am. Rep. 249; *The Dago*, 31 Fed. 574. If the appliances furnished are proper, and the injury results from their improper use, the ship owner is not liable: *The Kensington*, 91 Fed. 981 (see, also, *The Mary Stewart*, 5 Hughes, 312, 10 Fed. 137); nor is he liable where there was no obligation to furnish the tackle: *Jeffries v. De Hart*, 96 Fed. 494; and the use of the appliance was merely permissive on the part of the owner: *Pingree v. Leyland*, 135 Mass. 398.

On the same principle, if a ladder be a part of the appliances to be furnished by a vessel, the vessel is responsible to an employé of the stevedore who is injured by a defective ladder negligently furnished: *The Truro*, 31 Fed. 158; but not where the defect is latent, and no negligence is shown: *Lumney v. The Concord*, 58 Fed. 913; nor where a safe and proper ladder is furnished, and the injured person uses another and a temporary one not put in place by the owners of the vessels, or anyone with whose neglect they are chargeable: *Hughes v. The Preter de Conick*, 46 Fed. 795.

C. Miscellaneous.—As further illustrations of the application of the principle above discussed to cases in which appliances are furnished by one person to another under contract for temporary purposes, and by reason of the former's negligence, injury results to a third person, see the following for cases in which the lettor was held liable: *Johnson v. Spear*, 76 Mich 139, 15 Am. St. Rep. 298, 42 N. W. 1092 (engine furnished by owner of dock for unloading vessels); *Smith v. London etc. Docks Co.*, L. R. 3 Com. P. 326 (gangs supplied by dock owner injuring person with business on vessel); *Cook v. New York Floating Dock Co.*, 1 Hilt. (N. Y.) 436 (standards furnished by owner of dock, and to which staging around vessel is attached); *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 196, 48 N. W. 679; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559 (placing defective car on line of connecting carrier without inspection); *Fell v. Rich Hill Coal etc. Co.*, 23 Mo. App. 216 (defective hoist furnished by owner of mine to contractor working mine); *Hayes v. Philadelphia etc. Iron Co.*, 150 Mass. 457, 23 N. E. 225 (defective mast used as crane on delivery boat of coal dealer injuring employé of customer); *Elliott v. Hall*, L. R. 15 Q. B. D. 315 (defective truck for delivery of coal injuring employé of customer while unloading truck).

On the other hand, the following are cases in which the lettor was held not liable: *Smith v. Onderdonk*, 25 Ont. App. 171 (engine without handrail supplied to subcontractor—patent defect); *Central etc. Ry. Co. v. O'Hara*, 46 Ga. 17 (cars furnished to contractor—improper use by contractor); *Broslin v. Kansas City etc. R. Co.*, 114 Ala. 398, 21 South. 475 (improper brakes on coal cars supplied by defendant—not known by defendant that plaintiff's duties took him on such cars); *Caledonian I. R. Co. v. Mulholland*, [1898] App. Cas. 216 (permissive use of defective cars by connecting carrier); *Wright v. Delaware etc. Canal Co.*, 40 Hun, 343 (defective car delivered to connecting carrier, but no negligence shown); *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523, affirmed in 146 N. Y. 363, 41 N. E. 88 (defective rope in hoisting apparatus, where rope was selected by the injured party); *King v. New York etc. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37 (crane became defective for lack of repair during term of letting); *Winterbottom v. Wright*, 10 Mees. & W. 109 (defective stagecoaches supplied under contract with postmaster general. Injury to driver, see *supra*, 550; *M'Gill v. Bowman*, 18 Se. Sess. Cas., 4th ser. 206 (apparatus satisfactory to employer of injured party supplied by defendant); *Blackmore v. Bristol etc. R. Co.*, 8 El. & B. 1035 (party injured by crane supplied by railroad company, held a volunteer. See *supra*, 553).

POLLASKY v. SCHMID.

[128 Mich. 699, 87 N. W. 1030.]

MUNICIPAL CORPORATIONS—Vote of Two-thirds of the Members of a Common Council—What does not Amount to.—If a statute provides that if a municipal ordinance has been vetoed by the mayor, it may be reconsidered, but the vote of two-thirds of the members elected to the common council shall be necessary to pass it, the fact that there are vacancies in office due to death or resignation does not diminish the number of votes necessary to pass the ordinance over the veto. (p. 562.)

Mandamus to compel the city clerk of Detroit to publish an ordinance. The writ was denied, and the relator brought certiorari.

Groesbeck & Turner, for the relator.

John W. McGrath and P. J. M. Hally, for the respondent.

⁶⁹⁹ MOORE, J. This is an application for a writ of certiorari to review the action of the circuit judge of Wayne county, who denied an application for mandamus to compel the respondent to publish a certain ordinance which petitioner claims was regularly adopted. The ordinance referred to was vetoed by the mayor. The charter divides the city of Detroit into seventeen wards, and provides for the election of two aldermen from each ward. The legislative power of the city is vested in a common council, to be composed of aldermen elected from each ward: Charter, sec. 89. One of the aldermen died, and one resigned. After the ordinance was vetoed, a motion to pass it over the veto of the mayor received twenty-two votes, while seven votes were in the negative. Section 103 of the charter provides that, ⁷⁰⁰ after the veto of any ordinance, resolution, or proceeding, the common council shall proceed to reconsider the vote by which the same was passed, and after such reconsideration, two-thirds of all the members elected of the common council shall be necessary to pass or adopt the same. The sole question is as to the construction of this provision of the charter. The petitioner claims that, though thirty-four aldermen were in fact elected, as one had died and one resigned, the same number of votes would suffice to pass an ordinance over the veto of the mayor as would secure the passage of the ordinance if the council was made up of only thirty-two members.

There are not many authorities bearing upon the question, and they are not uniform. *State v. Orr*, 61 Ohio St. 384, 56 N. E. 14, sustains the contention of the petitioner, but we are not satisfied with the reasoning of the case. In *City of San Francisco v. Hazen*, 5 Cal. 170, the charter provided for a board of aldermen and a board of assistant aldermen, each to consist of one member from each ward; that a majority of each should constitute a quorum; and that no ordinance or resolution should be passed except by a majority of all the members elected. An ordinance was passed by a vote of four to three, there being a vacancy in the board by reason of the resignation of a member. Held, that the ordinance was not passed by a majority of all the members "elected," and was therefore void. This case was followed in *McCracken v. City of San Francisco*, 16 Cal. 591, where Field, C. J., wrote the opinion, declaring an ordinance passed under similar circumstances a nullity.

In *Pimental v. City of San Francisco*, 21 Cal. 352, Mr. Justice Field, speaking for the court, said: "At the time this ordinance was acted upon by the board of assistant aldermen there was a vacancy in the board, occasioned by the resignation of one of its members, so that of the eight members elected only seven remained in office. Of this number four members voted for the passage of the ordinance, and three against it. As a consequence ⁷⁰¹ the ordinance was not passed, not having received the necessary vote required by the charter then in force. The charter vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each board to be composed of eight members; and fixed the limits of their authority. . . . It declared that no ordinance should be passed 'unless by a majority of all the members elected to each board.' The ordinance in question, therefore, not having received the vote of a majority of all the members elected, was never passed. It was, in fact, rejected; as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes, an absolute nullity."

In *Satterlee v. City of San Francisco*, 23 Cal. 315, the question was reconsidered. It was claimed that the aldermen who it was alleged had resigned was not in fact elected, but was an alien, and not, therefore, eligible to office; but the court held that he had been regularly elected, that the charter provided that each board should judge of the qualifications of its members, that he was an officer de facto, and that the validity

of his election could not be inquired into in a collateral proceeding; and the court followed the other cases cited from that state: See, also, *Lawrence v. Ingersoll*, 88 Tenn. 52, 17 Am. St. Rep. 870, 12 S. W. 422; *Rex v. Devonshire*, 1 Barn. & C. 609; *Rex v. Bower*, 1 Barn. & C. 492; *Rex v. May*, 4 Barn. & Adol. 843; *Rex v. Morris*, 4 East. 17; *Rex v. Bellringer*, 4 Term Rep. 810; *Rex v. Miller*, 6 Term Rep. 268.

In *Peck v. Berrien Co. Board of Supervisors*, 102 Mich. 346, 60 N. W. 985, the resolution received eighteen out of twenty-six votes, but two of the eighteen had not been elected, but had been appointed to fill vacancies. The statute provided that the board of supervisors should have power, by a vote of two-thirds of all the members-elect, to designate, etc. Mr. Justice Hooker in that case says: "We find no authority for the proposition that a township temporarily represented by an appointed supervisor has not the same voice upon the board that it had before the vacancy. . . . That the use of the term 'elect' in section 702 489, 1 How. Stat., has a purpose, is plain: but we think it more reasonable to believe that it was intended to require the consent of two-thirds of a full board than that it was designed to deprive townships, which should be represented by appointive officers, of a voice in the proceedings. It was intended to preclude action by two-thirds of a quorum, or of a board whose members had been lessened by vacancies."

It is admitted that if two of the thirty-four aldermen had been temporarily absent, the ordinance would not have been passed. We cannot see how the fact that two of the thirty-four aldermen elected were permanently absent, instead of being temporarily so, would change the terms of the charter. The language is not ambiguous. The purpose, doubtless, was that when legislation was proposed the wisdom of which was in so much doubt as to meet with the veto of the mayor, before it could become a law it should receive the vote of two-thirds of all the aldermen, when all the wards of the city were fully represented in the council.

The action of the circuit judge is affirmed.

The other justices concurred.

Enactment of Statute.—In *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640, it was held, under a constitutional provision that "no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto," that an act would not be declared unconstitutional when passed by the affirmative vote of eleven senators in a body consisting of twenty-two members when full, one member having resigned after the opening of the session.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

DULION v. HARKNESS.

[80 Miss. 8, 31 South. 416.]

HOMESTEAD—Right to Claim After Decree Setting Aside Conveyance and Subjecting Property to Creditors' Claims.—A debtor after having a conveyance of his property set aside as fraudulent, may set up a claim to its exemption from sale by reason of his having made it a homestead since the entry of the decree. (p. 564.)

THE ONLY CONSEQUENCE of a Voluntary Conveyance of Property by a Debtor is to render it invalid as to his existing creditors, but though, as between him and them, it may be regarded as still his, he retains in it, as against them, the same rights as if he had not attempted to convey it. (p. 564.)

Walter A. White, for the appellants.

Harper & Harper, for the appellees.

13 TERRAL, J. W. T. Harkness became the debtor of T. P. Dulion and of B. Tucci, and while such debtor he made a voluntary conveyance of a lot of land in the city of Biloxi to his wife, Mrs. Sadie Harkness. Thereupon Dulion and Tucci filed their creditors' bill, under section 503 of the Code of 1892, to obtain a decree for their several debts against W. T. Harkness, and to set aside the conveyance of the lot of land by him to his wife as fraudulent and void as to them, and to subject the property so conveyed to the satisfaction of their demands, for all which they had a decree. Thereafter Harkness and wife moved upon and occupied said property as a homestead, and thereupon filed their supplemental bill, in the nature of a bill of review, to have their homestead right established and secured, and obtained an injunction against the sale thereof. Dulion

and Tueci moved to dissolve the injunction because the supplemental bill of Harkness and wife was without equity, and asked for damages for the wrongful suing out of said injunction, which, if found to be wrongful, were agreed to be fifty dollars. The court overruled the motion to dissolve the injunction against the sale of the lot, and the defendants appeal.

The sole question is whether a debtor, after having a conveyance of his property set aside as fraudulent, may set up a claim of the exemption of said property from sale by reason of his having made it his homestead since the decree avoiding ¹⁴ said conveyance. It is well settled at law that property upon which a judgment lien has attached may thereafter be made a homestead, and as such protected from any sale of it under the judgment: *Trotter v. Dobbs*, 38 Miss. 198; *Irwin v. Lewis*, 50 Miss. 363; *Letchford v. Carey*, 52 Miss. 791. It is not perceived why the rule in equity should be different from the rule established in courts of law. In our apprehension of it, the case of *Jones v. Hart*, 62 Miss. 13, determines the principle of the exemption of homesteads from sale under process at law to be applicable to like process of equity courts. By the plain letter of section 4226 of the Code of 1892, the only consequence of a voluntary conveyance of property by a debtor is to render it invalid as to his existing creditors, because as to them it is inequitable; but it is not inequitable to allow him to claim any rights he may have in the property to which his title still adheres as to creditors by construction of law. If it is his as to creditors, it is his so as to allow him to claim a homestead exemption in it. In *Kuevan v. Specker*, 11 Bush, 3—a case similar to this—the court said: “These appellees are asking now to subject the property to the payment of their debts, upon the ground that the conveyance to the son was fraudulent and void as to creditors; and, if made liable by the chancellor, it must be for the reason that it is still the property of Theodore Kuevan, the debtor. If his property, himself and wife being still in possession, the creditors will not be allowed to say that we can subject it to satisfy our demands because he is still the owner, and at the same time deny his right to a homestead for the reason that he is not the owner. If the property is made liable for Theodore Kuevan’s debts for the reason that the conveyance is fraudulent and void, it must be sold subject to the exemption made by law for the benefit of the debtor. A fraudulent conveyance does not enlarge the rights of creditors, but only leaves them to enforce such rights as if no conveyance had

been made." To the same effect are *Vogler v. Montgomery*, 51 Mo. 575; *Cox v. Wilder*, 2 Dill. 45 Fed. Cas. No. 3308; *Sears* ¹⁵ *v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378; *McFarland v. Goodman*, 6 Biss. 111, Fed. Cas. No. 8789; *Crummen v. Bennet*, 68 N. C. 494; *Wait on Fraudulent Conveyances*, sec. 46; *Thompson on Homestead Exemptions*, sec. 408. It is a maxim that equity follows the law, and it applies especially to the construction and effect of statutes. Wherefore we are of the opinion that the rule in equity should be the same as at law.

Affirmed.

A Claimant of a Homestead does not forfeit his right thereto by conveying it with an intent to defraud his creditors: *Dortch v. Benton*, 98 N. C. 190, 2 Am. St. Rep. 331, 3 S. E. 638. See, too, *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579, 15 Pac. 420; *Hamby v. Lane*, 107 Tenn. 698, 89 Am. St. Rep. 967, 64 S. W. 1067. And a conveyance set aside for fraud, at the suit of judgment creditors, cannot, upon execution issued under the decree in the case, be set up by such creditors as a bar to the debtor's claim of a homestead: *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378.

HOUSTON v. NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

[80 Miss. 31, 31 South. 540.]

MORTGAGES.—A Mortgagee Cannot Purchase at His Own Foreclosure Sale Under a Power, either directly or indirectly, unless the mortgage confers such power or the mortgagor consents to such purchase. It is not necessary for a mortgagor, when seeking to avoid the sale, to show either fraud or unfairness therein. (p. 567.)

MORTGAGE—Purchase by the Mortgagee in the Name of Another.—If, at a sale by a mortgagee under a power in the mortgage, the property is bid in by a third person acting for him, to whom the purchaser afterward conveys, nothing being paid on the bid except the credit of its amount after deducting the expense of the sale on the indebtedness secured by the mortgage, the effect is the same as if the mortgagee had purchased directly or in his own name. p. 569.)

MORTGAGE—Time for Filing Bill to Redeem from Sale Under.—Unless some statute of limitations provides otherwise, there is no hard-and-fast rule which can be laid down as to what is the time within which a mortgagor, or one claiming under him, must file a bill to avoid the sale and to redeem. Each case must be determined on its particular facts. (p. 569.)

LACHES in Filing a Bill to Redeem.—Where There is a Statute Fixing the Time within which a bill to redeem may be filed, no delay in filing it where the mortgagee has himself purchased under a power in the mortgage can bar or estop the mortgagor, if the suit is brought within the time designated by the statute. (p. 570.)

MORTGAGE—Bill to Redeem Brought in Favor of a Grantee of the Mortgagor.—If the mortgaged premises are sold under a power in the mortgage, the mortgagee becoming the purchaser, one who subsequently receives a quitclaim deed from the mortgagor may maintain a bill to redeem. (p. 571.)

EQUITY—Assignment of Right to File a Bill in.—A quitclaim deed by a mortgagor after a voidable sale has been made to the mortgagee under a power is not an assignment of a bare right to file a bill in equity for fraud committed on the grantor, which is against public policy. It transfers all the right and estate which the mortgagor had, including the right to file the bill to redeem. (p. 573.)

MORTGAGEE—Bill to Redeem Where There is an Innocent Purchaser.—If a sale is made under a power in a mortgage to a third person acting for the mortgagee, and the property is subsequently sold by such mortgagee to innocent purchasers, who pay part of the purchase price, the mortgagor or his successor in interest is in equity entitled to a decree that the mortgagee pay over the money so received, and that such purchasers make their further payments to the complainants. (p. 573.)

Bill to cancel a conveyance made to George J. Peet, and also a conveyance made to De Loach and for an accounting, and in the event that De Loach should be held to be an innocent purchaser, then that the defendant be required to pay to complainants the amounts received from De Loach, and that he be directed to pay over to complainants such sums as remain unpaid.

Mrs. David, while the owner of the property affected by the suit, mortgaged it to the National Building and Loan Association, to secure a debt owing to it from her. The mortgage contained a power to be exercised by the mortgagee, on default in the payment of the debt, to sell the premises at public auction and execute a conveyance to the purchaser. Acting under the power, the mortgagee exposed the premises for sale, and they were bid in by George J. Peet, July 1, 1895, and the amount of the bid was credited on the mortgage debt after deducting the expenses of the sale, but no payment was made by Peet. Twelve days later he conveyed to the mortgagee, who subsequently sold part of the property to Katharine and W. H. De Loach, who had paid part only of the purchase price when this suit was commenced. The complainant, after the sale was made, procured a quitclaim deed from the mortgagor. The trial court denied him all relief, and he thereupon appealed.

S. A. Witherspoon, for the appellant.

A. S. Bozeman, for the appellees.

³⁸ WHITFIELD, C. J. It is settled law in this state that a mortgagee cannot purchase, directly or indirectly, at a sale under his mortgage, unless the mortgage confers such right, or the mortgagor consents to such purchase: *Byrd v. Clarke*, 52 Miss. 623. Counsel for appellees earnestly insists that the mortgagor and those claiming under him have no absolute option to avoid such voidable sale, but only an option conditioned upon the existence of fraud or unfairness in the sale. He cites some Texas cases and a few other cases to support that view. The reasoning of these cases is that, unless the mortgagee is permitted to buy at his own sale, the property might at some time be sacrificed—might be sold for less than the debt—and that thus there would result injury and loss both to the mortgagor and the mortgagee. The complete response to this is that the rule is a broad and universal one, based upon public policy, and not one which looks at all to the interest of the mortgagor or mortgagee in any particular ³⁹ case. It is bottomed on the fundamental principle that no man shall be placed in a position where there shall arise a conflict between interest and integrity. 2 *Jones on Mortgages*, section 1877, says: "It is not necessary, in order to avoid the sale, to show that there was any actual fraud or unfairness in the transaction, when a mortgagee has violated the principle that a trustee can never be a purchaser. There might be fraud or unfairness, and yet this could not be proved. To guard against this uncertainty, and to place the trustee beyond the reach of temptation, the law allows cestui que trust to set aside such sale at his option, without showing that he has been in any way injured. A mortgage with a power of sale confers a trust coupled with an interest, but the rule applies with the same force as in the case of a naked trust. Without the agreement or consent of the mortgagor, he can acquire no title by a purchase, directly or indirectly, at his own sale under the power."

In *Thornton v. Irwin*, 43 Mo. 163, 164, the court say: "The doctrine that trustees, agents, administrators, guardians, attorneys, or others whose connection with any other person is such as to establish a confidential relation between them concerning his property, or give them special knowledge and opportunities in regard to it, cannot without, and often cannot with, his full knowledge and consent, become the purchaser

of such property, is well settled in the jurisprudence of England and of the United States. It is also well established by the civil law, and affirmed in those European states whose laws are founded upon it. The leading case in England is that of *Fox v. Mackreth*, 2 Brown Ch. 400, heard twice before Lord Chancellor Thurlow in 1788, and reviewed in the house of lords; and the doctrine of that case is affirmed and extended in all the authoritative cases since that time. Among the important cases in the United States where the question is involved are *Davoue v. Fanning*, 2 Johns. Ch. 252, *Michoud v. Girod*, 4 How. (U. S.) 503, and *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192. Chancellor Kent, in *Davoue v. Fanning*, 2 Johns. Ch. 252, gives a very able review of the English cases and those at that time decided in this country, and leaves but little to be said upon the question. He states the true ground of the position, and, in criticising some remarks of Lord Roselyn in another case, says: 'The objection to most of these observations is that they do not place the question on the true principle. However innocent the purchase may be in the given case, it is poisonous in its consequence. The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale.' In *Michoud v. Girod*, 4 How. (U. S.) 503, the interposition of the third person to bid for the trustee was treated as itself a badge of fraud, and Judge Wayne remarks: 'The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, per interpositam personam, carries fraud on the face of it.' In giving the reason of the rule, he says: 'The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand toward

each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In ⁴¹ this conflict of interest the law wisely interposes, and it makes no difference in the application of the rule that a sale was at public auction, bona fide, and for a fair price, etc. The inquiry in such a case is not whether there was not fraud in fact. . . . The rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing or on whose account he is acting, and his own individual interest." To the same effect is *Roberts v. Fleming*, 53 Ill. 196, and *Thomas v. Jones*, 84 Ala. 302, 4 South. 270. The running comment in *Hyde v. Warren*, 46 Miss. 28, 29, does not approve the cases which are cited. On the contrary, the court expressly refrains from expressing any opinion on the point.

Counsel next insists that this is not a sale by the mortgagor to the mortgagee, because George J. Peet purchased at the sale. But Peet was a mere nominal purchaser. It perfectly appears that he bought for the appellee on July 3, 1895, and conveyed to it on July 13, 1895. He paid nothing on his bid. He bid ten hundred and seventy-five dollars, out of which forty-three dollars were deducted for the expenses of the sale, and the balance was credited on the indebtedness of the mortgagor to the mortgagee. It is perfectly obvious that Peet was a mere conduit of the title for the mortgagee. In such case the law is exactly the same as if the mortgagee had bid in his own name in the first instance. This is expressly decided in *Roberts v. Fleming*, 53 Ill. 200, and also in *Thornton v. Irwin*, 43 Mo. 163, 164. Indeed, it needs no decision to maintain so manifestly proper a conclusion. "Qui facit per alium facit per se."

Counsel for appellees next insists that appellant is barred by unreasonable delay in filing the bill. If we were to deal with this question apart from the statutes of limitations, then no hard-and-fast rule can be laid down as to what is a reasonable time within which the mortgagor, or one claiming under him, should file the bill to avoid the sale and redeem. Each case must be determined upon its own peculiar facts: 2 Jones on ⁴² Mortgages, sec. 1885; 11 Am. & Eng. Ency. of Law, 2d ed., 225, note 4, and the authorities. In the section cited from Jones on Mortgages, thirteen years is held to be too long; and in the passage cited from the Encyclopedia twenty years is held

to be too long. In this case, it is shown conclusively that Mrs. David and her husband, the mortgagors, did not know until the latter part of 1900, or the first part of 1901, that the appellee was the real purchaser at the foreclosure sale on July 1, 1895, and that the appellant did not obtain the deed conveying the mortgagor's equity of redemption until some three or four months before the bill was filed. It cannot be held, under the facts of this case, that the delay has been unreasonable, apart from the statute of limitations, especially in view of the fact that the appellant offered to do equity by paying the full amount—principal and interest—due on the mortgage debt to the mortgagee. The mortgagee cannot sustain any possible injury. If it does not get the property, it is because of its own willful folly in becoming the purchaser at its own sale. But stale claims are unknown in this state, and hence a consideration of the effect of laches, wholly disconnected from any element of estoppel, in barring a bill to redeem, is, with us, useless. There is no element of estoppel here, whatever. *Helm v. Yerger*, 61 Miss. 51, points out the difference between mere laches and estoppel in cases of this sort. The cases of *Westbrook v. Munger*, 61 Miss. 336, and *Hill v. Nash*, 73 Miss. 862, 19 South. 710, are conclusive that, so far as mere laches is concerned (there being no element of estoppel in the case), no lapse of time short of the period that would bar the bill to redeem under section 2732 of the Code of 1892 (ten years), will bar the right to file the bill. We said in *Hill v. Nash*, 73 Miss. 862, 19 South. 710: "Finally it is contended by counsel for appellant that as ten years, lacking only four days, intervened between the death of N. P. Ragan, the father, and the date of the institution of the suit, a court of equity, in the exercise of its own inherent powers, independently of the statute of limitation, may and should ⁴³ refuse relief, on the ground of discouraging stale claims or gross laches, or unexplained acquiescence in the assertion of an adverse right. Much and excellent authority is cited by counsel in support of this proposition, but it has been decided that there is no such thing as a stale claim, properly so called, in this state; and, by positive law, the statute of limitations is to be applied in our courts of equity as in our courts of law. With us no claim is barred until the limitation of the statute has accrued: Code, sec. 2731."

Counsel for appellees next insists that, even if the sale is voidable at the instance of the mortgagor, the appellant could have no right to maintain this bill, derived from his quitclaim deed from the mortgagor executed after the foreclosure sale; and

he very earnestly contends that when the rule is announced that in cases of a voidable sale the mortgagor, or any person claiming under him, may avoid the sale, it is only meant that any person claiming under him at the date of the sale, and having at the time of the sale an existing interest in the property, may avoid the sale, and not one who acquires an interest under the mortgagor after the sale, and with notice of the sale. He cites many authorities, among which is *Wade v. Thompson*, 52 Miss. 367. Counsel misconceives this case. That was a contest between rival claimants of the title in ejectment, and not a bill filed to avoid a sale and to redeem. The case of *Wormell v. Nason*, 83 N. C. 32, does not support the contention. On the contrary, it expressly declares, on page 36, that the mortgagor, or anyone claiming under him, as assignee or creditor, may file the bill to avoid the sale; and the court held that since the creditors were not prejudiced by the sale, and the administrator was not acting or professing to act in their interest, he could not, as administrator, on those facts, maintain such a bill. But the court expressly said that there might be cases in which even an administrator might file such a bill. The case of *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145, 7 South. 770, is the only case that we have seen that ⁴⁴ appears to sustain the contention of counsel for the appellees. And the whole case proceeds upon the idea that the equity of redemption cannot be conveyed or transferred by a quitclaim after a voidable sale, and that no bill could be maintained to avoid such sale by one who purchased the equity of redemption from the mortgagor, and obtained a quitclaim deed purporting to convey the equity of redemption, after such voidable sale. Whether this decision was based upon some statute does not appear. The reasoning seems to be that whilst the equity of redemption constitutes a beneficial estate in the land, and may be conveyed as any other interest in the land prior to the foreclosure sale, yet, after a foreclosure sale, though voidable, it can no longer be so conveyed, because the equity is barred by the foreclosure, and, being barred, no right of redemption exists. But this case obviously confuses a valid sale with a voidable sale. So long as the sale remains voidable, it is liable to be avoided upon a bill filed for that purpose; and, whenever thus avoided, the status quo, as to the right to redeem, is put just where it was ante the voidable foreclosure sale. The court conceded in this case that the mortgagor, or any person claiming under him in privity, may disaffirm the sale and redeem in a reasonable time. How it can reconcile this concess-

sion with the position that those claiming under the mortgagor in privity cannot file such a bill within a reasonable time after the sale, it is impossible for us to understand. The misconception of the court is obvious. It is idle to speak of the right of those in privity with the mortgagor to file a bill within a reasonable time after the sale, and yet say that the right to redemption is cut off by even such voidable sale. The fallacy of the reasoning is in holding that a voidable sale can ever, at all, have the effect of finally and conclusively cutting off the right of redemption, and changing such equity of redemption, which was an interest in the land, into a mere right to disaffirm. Such voidable sale has no such conclusive effect, obviously. So far as the equity of redemption is concerned, a voidable sale is no ⁴⁵ sale at all, leaving such equity wholly unaffected, if the option to avoid it is seasonably exercised. It is in direct conflict with *Thomas v. Jones*, 84 Ala. 302, 4 South. 270, which supports our view, and the view of all other authorities we have seen. The court in that case says (84 Ala. 304, 4 South. 271): "But the rule is clearly settled to be otherwise—where the mortgagee, when unauthorized, purchases at his own sale. Not that the sale, so long as it is permitted to stand, is ineffectual to cut off the equity of redemption; for such is, undoubtedly, its legal effect. But the court, construing the transaction as a fraud on the rights of a cestui que trust by the trustee, will set aside the sale at the request of the injured party, who files his bill to redeem within a reasonable time, offering to do equity. When the sale is thus set aside, the complainant's equity of redemption is restored to its original status, subject only to the lawful charges incident to redemption, but otherwise it is completely disembarassed of the sale." This is the sound view, manifestly, and a multitude of authorities support this view, as can be seen by reference to 11 American and English Encyclopedia of Law, second edition, pages 214-224, inclusive—the text and the authorities in the notes: See, specially, sec. 3, p. 216, and authorities cited in it. The case of *Boarman v. Catlett*, 13 Smedes & M. 153, expressly sanctions the same view, the court saying: "The right extends to the judgment creditor, where the judgment constitutes a lien, and to an assignee": See specially, also, *Dickinson v. Burrell*, L. R. 1 Eq. 337; *McMahon v. Allen*, 35 N. Y. 403; *Marvin v. Inglis*, 39 How. Pr. 329—all cited at close of note to *Marshall v. Means*, 56 Am. Dec. 451. And see specially, also, the note

and authorities in *Horn v. Indianapolis Nat. Bank* (Ind. Sup.), 21 Am. St. Rep. 240, 246, 247.

Counsel for appellees next contends that this is a bill to remove clouds from title, but this is an entire misconception of the bill.

Counsel finally contends that the appellant obtained by his ⁴⁶ quitclaim deed only the assignment of a bare right to file a bill in equity for alleged fraud committed upon the assignor, and that this assignment is void as against public policy, and as savoring of the character of maintenance. Sections 2433 and 2438 of the Code of 1892, and the case of *Cassedy v. Jackson*, 45 Miss. 397, dispose of this contention adversely to this view. This is not a mere right to file a bill to set aside a deed for fraud. It is unlike *Crocker v. Bellangee*, 6 Wis. 615, 70 Am. Dec. 489, and the other cases on that line cited in note to *Marshall v. Meins*, 56 Am. Dec. 449. *Crocker's* case is cited in *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145, 7 South. 770, also. Under the law in this state appellant got all the estate and right his assignors had, and could file this bill, since they could have done so.

We also think that the prayer of the bill that the appellees be required to pay the complainant the money it has received from Katharine and W. H. De Loach, the innocent purchasers for value without notice, and that such purchasers be required to make the further payments for the fifty-two feet off the east end of said lots sold to W. H. and Katharine De Loach, co-defendants herein, by appellees, to complainant, should be granted. The mortgagee gets his debt, with all interest, and is not prejudiced. Its sale, being avoided, is as to it avoided in toto, the rights of the innocent purchasers being fully protected. A proper accounting should also be had.

Decree reversed, and remanded to be proceeded with in accordance with this opinion.

SALES UNDER POWERS IN MORTGAGES AND TRUST DEEDS.*

- I. Validity of Power and of the Proceedings Thereunder.
- II. Death of Mortgagor.
- III. Purchasers.
 - a. Direct Purchase by Mortgagee.
 - b. Effect of Such Purchase.
 - c. Effect of Purchase Through Third Person.
 - d. Purchase by Mortgagee Under Authorization in Power.
 - e. Purchase by Other Interested Party.

*REFERENCE TO MONOGRAPHIC NOTE.

Sales and conveyances by trustees: 19 Am. St. Rep. 266, 267.

- IV. Inadequacy of Price.
 - a. When Does not Affect Sale.
 - b. When Affects Sale.
- V. Sales in Mass or in Parcels.
- VI. Postponement of Sale.
 - a. Notice of Postponement.
- VII. Terms of Sale.
- VIII. Laches.
- IX. Bids and Bidders.
- X. Presence of Trustee or Mortgagee.
- XI. Effect of Sale or Equity of Redemption.
- XII. Effect of Defective Sale.

I. Validity of Powers and of the Proceedings Thereunder.

In the absence of statutory regulation on the subject, a power of sale contained in a mortgage or trust deed is valid, and the mortgagee or trustee may make a valid sale, and convey a good title to the purchaser under it, without the intervention of a court: *Fogarty v. Sawyer*, 17 Cal. 589; *Longwith v. Butler*, 8 Ill. (3 Gilm.) 32; *Hyde v. Warren*, 46 Miss. 13; *Carson v. Blakey*, 6 Mo. 273, 35 Am. Dec. 440; *Evans v. Lee*, 11 Nev. 194; *Bradley v. Chester Valley R. R. Co.*, 36 Pa. St. 141. A power in a mortgage to sell the mortgaged property upon default in the payment of the debt is a matter of contract between the parties, and will not be interfered with by the court: *Bowen v. Kendall*, *Bruner* Col. Cas. 704. A trust deed in the nature of a mortgage may confer upon the trustee power to sell the premises on default in the payment of the debt secured by the deed, and a sale thereunder conducted in accordance with the terms of the power in the deed will pass the granted premises to the purchaser upon its consummation by a conveyance: *Bell etc. Min. Co. v. First Nat. Bank*, 156 U. S. 470, 15 Sup. Ct. Rep. 440, affirming 8 Mont. 32, 19 Pac. 403. So a mortgagor may invest the mortgagee with power to sell the premises upon default in the payment of the debt, and if the sale is conducted in accordance with the conditions of the power, and is fairly made, a good title will pass to the purchaser: *Fogarty v. Sawyer*, 17 Cal. 589. A power of sale contained in a mortgage is valid, and, under it, the mortgagee may sell in accordance with the terms of the instrument, and thus foreclose without resort to proceedings at law or in equity: *Crocker v. Robertson*, 8 Iowa, 404; *Hyde v. Warren*, 46 Miss. 13. Neither legal nor equitable proceedings are necessary to enforce the security under the power contained in a trust deed, if there is an express covenant therein, that a sale made in pursuance thereof shall bar the equity of redemption, and a sale under such power conveys an indefeasible title: *Bloom v. Van Rensselaer*, 15 Ill. 503. A trustee or mortgagee, to sell under a power, in default of

the payment of the mortgage money, may execute the trust and sell without the interposition of a court. Such sale perfects foreclosure, and bars the equity of redemption on the part of the grantor or mortgagor: *Sims v. Hundley*, 2 How. (Miss.) 896; *Dibrell v. Carlisle*, 48 Miss. 691. Parties to a mortgage may, by stipulation, regulate the terms of the power of sale of the premises by the mortgagee, and the courts will not interfere to control the right in the absence of fraud, or some statutory regulation on the subject: *Elliott v. Wood*, 45 N. Y. 71. In one state, at least, it is held that, in the absence of statutory regulation, a sale of land under a power of sale, in a mortgage, without the intervention of a court, is invalid. The remedy of the mortgagee is confined to an action. This is the rule in Nebraska: *Wheeler v. Sexton*, 34 Fed. 154. But generally, an express stipulation inserted in a mortgage or trust deed, that the mortgagee or trustee may sell the premises on failure of performance of the condition by the mortgagor, is a valid grant of a power of sale, and a sale fairly made in pursuance of such power will be upheld: *Very v. Russell*, 65 N. H. 646; *Pearson v. Gooch*, 69 N. H. 208, 40 Atl. 390.

While a power of sale contained in a mortgage or trust deed is valid, and a sale thereunder may confer a good title on the purchaser, the party foreclosing thereunder must see that in all material matters he keeps within the powers given him, for there are no legal presumptions or intendments raised to support his proceedings, as there might be if the sale was made pursuant to a decree of court: *Hurd v. Chase*, 32 Ill. 45, 83 Am. Dec. 249; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95. The party selling, although he has had a legal right to sell under the power to satisfy the mortgage debt, yet in the performance of this duty he must exercise good faith and use reasonable diligence to protect the rights of the mortgagor under the terms of the power. He must use reasonable effort to obtain a fair price for the property, and must properly follow and conduct the sale in those particulars, which the contract leaves to his determination: *Pearson v. Gooch*, 69 N. H. 208, 40 Atl. 390. Sales by mortgagees or trustees under powers, while valid so far as the authority to sell is concerned, being much liable to abuse, are most jealously watched by courts of equity, and, upon slight proof of unfair conduct, or of a departure from the terms of the power, will be instantly set aside: *Longwith v. Butler*, 3 Gilm. 32. While the power of sale contained in a mortgage is valid, the sale thereunder to be valid must be made in strict compliance with the terms of the power, and must be openly and fairly conducted: *Atkins v. Crumpler*, 118 N. C. 532, 24 S. E. 367.

II. Death of Mortgagor.

In those states where the common-law rule prevails that a power to sell contained in a mortgage is coupled with an interest, the death of the mortgagor does not revoke or suspend the power, and a sale of the land by the mortgagee, fairly and honestly conducted, made

after the death of the mortgagor, under the power in the mortgage, is valid: *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Strother v. Law*, 54 Ill. 413; *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111; *Varnum v. Meserve*, 8 Allen, 158; *Connors v. Holland*, 113 Mass. 50; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Reilly v. Phillips*, 4 S. Dak. 604, 57 N. W. 780; *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714, 29 S. E. 720. A sale under such conditions is valid without notice to the heirs of the mortgagor: *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714, 29 S. E. 720. And the fact that the heirs of the mortgagor who succeed to the equity of redemption are infants does not affect the mortgagee's power of sale: *Reilly v. Phillips*, 4 S. Dak. 604, 57 N. W. 780. The effect of a regular sale under such power, all of the prerequisite conditions named in the mortgage being complied with, is to foreclose the equity of redemption of the mortgagor and his successors in interest. The right of a trustee under a power in a trust deed to sell the land for the payment of the debt is generally not affected by the death of the grantor: *Wilburn v. Spofford*, 4 Sneed (Tenn.), 698; *Hodges v. Gill*, 9 Baxt. 378. If a partnership has conveyed land in trust with power to sell, to secure a firm debt, the death of one partner does not affect the power of the trustee to sell: *Schwab Clothing Co. v. Claunch* (Tex.), 29 S. W. 922.

In some states, the death of a mortgagor, or of a grantor, in a deed of trust revokes the power in the mortgage or trust deed authorizing a sale of the property upon default in the payment of the debt. In these states, of course, a sale made after the death of the mortgagor is void: *Miller v. McDonald*, 72 Ga. 20; *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606; *Buchanan v. Monroe*, 22 Tex. 537. The result of this rule is that a deed of trust or mortgage containing a power of sale, upon the death of the person executing it, only secures the creditor for whose benefit it was made priority over such debts or claims against the debtor's estate as by statute it is entitled to in due course of administration: *McLane v. Paschal*, 47 Tex. 365. Thus expenses of last sickness, funeral expenses, expenses of administration, family allowances, dower, and various other claims may have preference over the lien of the mortgage: *Miller v. McDonald*, 72 Ga. 20; *Robertson v. Paul*, 16 Tex. 472. It naturally follows, under this rule, that a mortgage or trust deed may become of no value, and be a security that does not secure.

III. Purchasers.

a. Direct Purchase by Mortgagee.—Although mortgages with power of sale are not looked upon with as much disfavor as they once were, still, courts of equitable jurisdiction will guard the rights of the mortgagor with jealous care, and the rule generally prevails that a mortgagee with power to sell is a trustee, and, as such, is

not allowed to purchase directly at his own sale, so as to render the sale binding, or cut off the equity of redemption. The mortgagee cannot be both vendor and purchaser, and, if he purchases at his own sale, he is still a trustee for the mortgagor: *Imboden v. Hunter*, 23 Ark. 622, 79 Am. Dec. 116; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130; *Reddick v. Gressman*, 49 Mo. 389; *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33; *Lockett v. Hill*, 1 Woods C. C. 552, Fed. Cas. No. 8443. If power is given the mortgagee to direct and control the sale, and the time, manner and terms upon which it is to be made, he is not permitted to purchase the legal title, however innocent and free from fraud the purchase may be: *Wade v. Harper*, 3 Verg. 383. If a mortgage provides for a sale by the mortgagee, or, in case of his refusal to act, by the marshal, they are cotrustees, and the mortgagee, by refusing to sell, cannot relieve himself of his disability to purchase at the sale of the marshal: *Games v. Allen*, 58 Mo. 537. A second mortgagee has no more right to purchase at the sale under the prior mortgage than has the mortgagee thereunder, but the former has a clear equity to be reimbursed for the money paid under such sale: *Taylor v. Heggie*, 83 N. C. 244. If the land is bid off under an agreement between the bidder and the mortgagee that conveyance shall be made to the latter, and it is so made, the legal title does not vest in him so as to cut off the equity of redemption: *Simpson v. Simpson*, 107 N. C. 552, 12 S. E. 447; *Parmenter v. Walker*, 9 R. I. 225. If the mortgagor assents to the acquisition of the title by the mortgagee, the latter may become the purchaser at his own sale: *Griffin v. Marine Co.*, 52 Ill. 130; *Dawkins v. Patterson*, 87 N. C. 384; *Medsker v. Swaney*, 45 Mo. 273. If the note secured by the mortgage is transferred to a firm by the payee, who is a member thereof, all of the members of the firm become cotrustees, and no member thereof can purchase under the power contained in the mortgage, so as to foreclose the equity of redemption: *Mapps v. Sharpe*, 32 Ill. 13. Although the mortgagee cannot purchase directly at his own sale, he may do so when the sale is made by a sheriff or other officer named in and as directed by the statute: *Ramsey v. Merriam*, 6 Minn. 168; *Allen v. Chatfield*, 8 Minn. 435; *Lewis v. Duane*, 69 Hun, 28, 23 N. Y. Supp. 433.

b. **Effect of Such Purchase.**—It is generally settled that a mortgagee cannot, directly or indirectly, purchase at the sale under a power contained in his mortgage, so as to cut off the right to redeem unless the mortgagor confers such right, or the mortgagor consents to such purchase. Such sale and purchase are not, however, void, but voidable merely at the election of the mortgagor. They are valid for all purposes if made fairly and without fraud, except that the mortgagor or those claiming under him may redeem within a reasonable time: *Carter v. Thompson*, 41 Ala. 375; *Robinson v. Cullom*, 41 Ala. 693; *McLean v. Presley*, 56 Ala. 211; *Garland v. Watson*, 74 Ala. 323; *Gassenheimer v. Molton*, 80 Ala. 521, 2 South. 652; *Ezzell v. Watson*, 83 Ala. 120, 3 South. 309; *McCall v. Mash*, 89 Ala. 487, 18 Am. St.

Rep. 145, 7 South. 770; *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747; *Copsey v. Sacramento Bank*, 133 Cal. 659, 87 Am. St. Rep. 238, 66 Pac. 7; *Brewer v. Harrison*, 27 Colo. 349, 62 Pac. 224; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928; *Sandback v. Thornton*, 106 Ga. 81, 31 S. E. 805; *Gibbons v. Hoag*, 95 Ill. 45; *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Dyer v. Shurtleff*, 112 Mass. 165, 17 Am. Rep. 77; *Thornton v. Irwin*, 43 Mo. 153; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Very v. Russell*, 65 N. H. 646, 23 Atl. 522; *Joyner v. Farmer*, 78 N. C. 196; *Martin v. McNeely*, 101 N. C. 634, 8 S. E. 231; *Averett v. Elliott*, 109 N. C. 560, 13 S. E. 785; *Austin v. Stewart*, 126 N. C. 525, 36 S. E. 37. If the mortgagee himself becomes the purchaser, either directly or indirectly, without being authorized thereto in the mortgage, the only right remaining in the mortgagor is to disaffirm the sale, within a reasonable time, by resort to a court of equity and an offer to redeem: *American etc. Mortgage Co. v. Pollard*, 120 Ala. 1, 24 South. 736; *British etc. Mortgage Co. v. Norton*, 125 Ala. 522, 28 South. 31. And the sale will not be disaffirmed without an offer to redeem: *Copsey v. Sacramento Bank*, 133 Cal. 669, 85 Am. St. Rep. 238, 66 Pac. 7. In such case the mortgagee purchasing is entitled to hold the legal title to the subject of the trust as security for the amount paid by him with interest: *Harrison v. Manson*, 95 Va. 593, 29 S. E. 420. But a mortgagee who purchases at a sale made by himself under a power of sale contained in the mortgage does not acquire an absolute estate. Such sale is subject to disaffirmance and the right of the mortgagor to redeem, and does not alter the relation existing between the parties: *Whitehead v. Hellen*, 76 N. C. 99; *Gibson v. Barbour*, 100 N. C. 192, 6 S. E. 766. If the mortgagee has purchased under a power contained in the mortgage, without express authority, or the consent of the mortgagor, the latter always has a right, within a reasonable time, to disaffirm the sale, and ask for redemption and an accounting, but if he takes no steps to disaffirm the sale, he cannot assign, sell or convey the land so as to vest in his assignee the right to disaffirm the sale, and redeem in his own name: *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145, 7 South. 770.

The assignee of a mortgage containing a power of sale, but not expressly authorizing the mortgagee to purchase, has no right to purchase at his own sale, so as not to cut off the equity of redemption: *Martinez v. Lindsey*, 91 Ala. 334, 8 South. 787; *Mapps v. Sharpe*, 32 Ill. 13. But the indorser of a note secured by mortgage containing a power of sale cannot disaffirm a sale of the premises under the power to the assignee of the mortgage, unless such disaffirmance is made within a reasonable time: *Patten v. Pearson*, 60 Me. 220. And if the assignee of a debt secured by mortgage, with power of sale, purchases the property at his own sale, the debtor cannot disaffirm the sale and redeem the property without an offer to refund the money paid at the sale: *Turner v. Smith*, 11 Tex. 620. If a mortgagor or his assignee becomes a purchaser at his own sale under

the power, not being authorized to do so, he may compel an election by the mortgagor, either to ratify or disaffirm the sale: *Craddock v. American Freehold etc. Co.*, 88 Ala. 281, 7 South. 196.

c. Effect of Purchase Through Third Person.—A sale under a power contained in a mortgage, at which the mortgagee purchases the property through a third person, is not absolutely void, but merely voidable at the instance of the mortgagor, upon application seasonably made and an offer to redeem: *Thomas v. Jones*, 84 Ala. 302, 4 South. 270; *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; *Landrum v. Union Bank*, 63 Mo. 48; *Whitehead v. Whitehurst*, 108 N. C. 458, 13 S. E. 166; *Howard v. Davis*, 6 Tex. 174. If the mortgagee is indirectly a purchaser at a sale under a power contained in a mortgage which does not give him the right to purchase, the sale is not void, but only voidable, and if, before proceedings are taken to set aside the sale, the nominal purchaser sells the land to a bona fide purchaser for an adequate consideration, he takes a good title: *Burns v. Thayer*, 115 Mass. 89. The fact that a third person who purchased the lands at a sale under the power contained in the mortgage was the nominal purchaser, and afterward conveyed the lands to the mortgagee, does not operate as a mere assignment of the mortgage, but conveys the legal title to the lands to the mortgagee, and upon this title he may maintain ejectment against the mortgagor: *Williamson v. Mayer*, 117 Ala. 253, 23 South. 3. The fact that a trustee in making a sale of property under a power contained in the mortgage, knew that the purchaser was bidding for the mortgagee, is not sufficient to induce a court of equity to set aside the sale: *Lucas v. Oliver*, 34 Ala. 626. If, at the sale under the power, third persons purchase the land, but afterward inform the mortgagee that they cannot pay the purchase price, whereupon he agrees to take the land at their bid, he does not thus become a purchaser at his own sale, and the mortgagor's equity of redemption is effectually cut off: *Durden v. Whetstone*, 92 Ala. 480, 9 South. 176. Although a sale, under a power contained in the mortgage, is voidable at the seasonable election of the mortgagor, when the property is bought in for the mortgagee, yet the mortgagor cannot be heard to question the sale and proceedings, when, with full knowledge of the facts, he stands by and sees the purchaser sell to a third person without notice, and interposes no claim or objection, and allows such third person to pay for the property, and make valuable improvements thereon: *Jenkins v. Pierce*, 98 Ill. 646. The assignee in bankruptcy of such mortgagor is also estopped to question the validity of such sale: *Jenkins v. Pierce*, 98 Ill. 646. In some jurisdictions, if the trustee in a deed of trust, or the mortgagee under a power of sale, indirectly becomes the purchaser at his own sale, the cestui que trust is entitled in equity to set aside the sale, and have the property reoffered for sale, without inquiry as to whether or not the sale was advantageous to the purchaser: *Bank of Old Dominion v. Dubuque etc.*

R. R. Co., 8 Iowa, 277, 74 Am. Dec. 302; Sypher v. McHenry, 18 Iowa, 232.

d. **Purchase by Mortgagee Under Authorization in Power.**—A mortgage of property containing a power of sale, and authorizing the mortgagee to sell and become the purchaser at such sale, is valid: Elliott v. Wood, 53 Barb. 285; and if the mortgage contains an express provision authorizing the mortgagee to purchase at a sale under the power, and he does become the purchaser, the mortgagor cannot disaffirm the sale, and be allowed to redeem, except upon allegation and proof of facts which would invalidate if a third person had become the purchaser. All that is required in such case to make the purchase by the mortgagee valid and binding is that the sale be in all respects fairly and faithfully conducted: Knox v. Armistead, 87 Ala. 511, 13 Am. St. Rep. 65, 6 South. 311; Ellenbogen v. Guffey, 55 Ark. 268, 18 S. W. 126; Matthews v. Daniels (Ark.), 21 S. W. 469; Mutual Loan etc. Co. v. Haas, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980; Macy v. Southern etc. Assn., 102 Ga. 812, 30 S. E. 430; Hall v. Towne, 45 Ill. 493; Galvin v. Newton, 19 R. I. 176, 36 Atl. 3; Robinson v. Amateur Assn., 14 S. C. 148.

A mortgagee selling under a power of sale in the mortgage may, if its terms authorize him to do so, be the purchaser at the sale, and make the deed in his own name, directly to himself: Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476; Marsh v. Hubbard, 50 Tex. 203; and this, even when he is the only bidder, if full and fair opportunity is given to bidders to attend and participate in the sale, and there is no collusion: Lathrop v. Tracy, 24 Colo. 382, 65 Am. St. Rep. 229, 51 Pac. 486. So the trustee in a deed of trust executed for the benefit of certain creditors of the grantor, may purchase the property at his own sale, made under the power contained in the deed, and authorizing him to purchase: Bohn v. Davis, 75 Tex. 24, 12 S. W. 837.

If mortgagee with power of sale expressly authorized to purchase the land, at the sale, becomes the highest bidder, he may hold the land, provided he rebuts the presumption of fraud arising from the trust relation, and having the right to acquire the equity of redemption by virtue of a sale under a mortgage authorizing him to purchase at the sale, the fact that a trustee, to whom the mortgagor had conveyed the equity of redemption, joined with the mortgagee in the sale and in the execution of a deed to such mortgagee does not affect the validity of the sale: Jones v. Pullen, 115 N. C. 465, 20 S. E. 624. The fact that the purchaser at the sale under a deed of trust was the trustee's attorney does not vitiate the sale, when the trustee was one of the cestuis que trust, and they, by the terms of the deed, were authorized to purchase: Kennedy v. Dunn, 58 Cal. 339. It is valid for the mortgagor to authorize the auctioneer who shall sell under the power contained in the mortgage to make a conveyance to the purchaser, and if power is given in the mort-

gage to the mortgagee to become a purchaser at the sale, his purchase and conveyance from the auctioneer invests him with title as fully as if a stranger had purchased: *Gamble v. Caldwell*, 98 Ala. 577, 12 South. 424. If a mortgage contains a power of sale to the mortgagee and his assigns, and confers upon the mortgagee the privilege of purchasing at such sale, but does not expressly authorize his assignee to do so, the privilege of purchasing is as much a part of the security passing to the assignee as the power of sale itself: *Ward v. Ward*, 108 Ala. 278, 19 South. 354. A mortgagee with power to sell and convey the land may acquire a good title through a third person, with the consent of, or under an agreement with, the mortgagor: *Dobson v. Racey*, 8 N. Y. 216.

e. Purchase by Other Interested Party.—A creditor whose debt is secured by a deed of trust on real estate to a third person as trustee may purchase the property at a sale by the trustee under the terms of the trust: *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. Rep. 50; *Easton v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. Rep. 1297. The beneficiary in a deed of trust may bid and buy at the sale made for his benefit by the trustee under the power contained in the trust deed: *Springfield etc. Co. v. Donovan*, 147 Mo. 622, 49 S. W. 500; *Monroe v. Fuchter*, 121 N. C. 101, 28 S. E. 63. In the absence of fraud, a stranger to the sale cannot object to its validity on the ground that one of the beneficiaries bid off the land at a sale under a trust deed, and afterward directed that conveyance be made to a third person: *Jones v. Hagler*, 95 Ala. 529, 10 South. 345. If, by agreement by a debtor and his sureties, his lands are conveyed to a trustee, to be sold, and the proceeds distributed among such sureties according to the amounts paid by them respectively on his behalf, a surety may, at the sale under the trust deed, it being bona fide, bid and buy the land discharged of the trust: *Landis v. Curd*, 63 Mo. 104. One who sells and conveys his lands to another, and takes back a trust deed to secure the payment of the purchase price, may bid either for himself, or as the agent for another, at the sale of the property under the deed of trust: *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544. A grantee, in an absolute deed, buying in the property at a sale under a power in a prior trust deed acquires a good and valid title: *Turner v. Littlefield*, 142 Ill. 630, 32 N. E. 522. If one, after giving a trust deed on his land conveys to another an undivided half thereof, the latter may properly become the purchaser of the estate of the former at the sale under a power in the trust deed: *Burr v. Mueller*, 65 Ill. 258. A receiver of an insurance company, holding notes given by the company, and secured by trust deed, may legally bid off the property at the sale under the trust deed to prevent a sacrifice: *Jacobs v. Turpin*, 83 Ill. 424. The fact that the purchaser at a sale under a trust deed had acted as intermediary in making the loan does not make him such a party in interest as to render his purchase fraudulent against the borrower: *Seip v. Grinnan* (Tex.

(Civ. App.), 36 S. W. 349. The administrator of the grantor in a deed of trust may make a valid purchase of the land sold at the trustees' sale under the power contained in the deed: *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078.

IV. Inadequacy of Price.

a. When does not Affect Sale.—A sale under a power contained in a mortgage is always presumed to be regular and valid, and mere inadequacy in the price bid does not in itself invalidate or affect the sale, otherwise properly conducted: *Ward v. Ward*, 108 Ala. 278, 19 South. 354; *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *Lathrop v. Tracy*, 24 Colo. 383, 65 Am. St. Rep. 229, 51 Pac. 486; *Kennedy v. Dunn*, 58 Cal. 339; *Booker v. Anderson*, 35 Ill. 66; *Waterman v. Spaulding*, 51 Ill. 425; *Hoodless v. Reid*, 112 Ill. 105; *Bowman v. Ash*, 36 Ill. App. 115; *Singleton v. Scott*, 11 Iowa, 589; *Hubbard v. Jarrell*, 23 Md. 66; *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868; *Condon v. Maynard*, 71 Md. 601, 18 Atl. 957; *Landrum v. Union Bank*, 63 Mo. 48; *Keith v. Browning*, 139 Mo. 190, 40 S. W. 764; *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078; *Klina v. Vogel*, 11 Mo. App. 211; *Clark v. Trust Co.* 100 U. S. 149; *Riggs v. Clark*, 71 Fed. 560; *Haggart v. Ranger*, 4 Woods, 402. If there is no fraud or irregularity in the sale under the power, mere inadequacy of price, especially if the right of redemption remains, is no ground for setting aside the sale: *Johnson v. Cocks*, 37 Minn. 530, 35 N. W. 436.

Mere inadequacy of price is not sufficient ground for setting aside such a sale, unless the inadequacy is so gross as to furnish ample evidence of fraud: *Monroe v. Fuchtlcr*, 121 N. C. 101, 28 S. E. 63; *Robinson v. Amateur Assn.*, 14 S. C. 148. Inadequacy of price, unless so gross as to raise a strong presumption of fraud, unaccompanied by serious irregularities in the mode of sale, or by circumstances of unfairness toward the debtor, is not ground for setting aside a sale under a power contained in a mortgage or trust deed: *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804; *Million v. McRee*, 9 Mo. App. 344; *Routt v. Milner*, 57 Mo. App. 50. Inadequacy of price does not alone authorize the setting aside of such a sale, and is significant only when connected with other facts tending to show bad faith, mistake or undue advantage taken of the weakness or ignorance of persons whose property rights are affected by the sale, or with some other ground of equitable relief: *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104. The fact that the sale was for less than the real value of the property is never sufficient ground to require it to be set aside: *Seip v. Grinnan* (Tex. Civ. App.), 36 S. W. 349. Neither is the fact that the property was sold at a great sacrifice: *Haines v. Cowles*, 16 N. C. 420. A sale under a power in a trust deed should not be set aside for inadequacy of price where the evidence shows the property to be valued at variously estimated amounts slightly above and below that for which it was sold: *Basnett v. Higgins*, 2 W. Va. 485.

Such sale will not be set aside on the sole ground that the price paid was only about one-half of the value of the property: Hoyt v. Pawtucket Institution, 110 Ill. 390; Austin v. Hatch, 159 Mass. 198, 34 N. E. 95; Maloney v. Webb, 112 Mo. 575, 20 S. W. 683. All that is required in a foreclosure of a mortgage of land containing a power of sale is that the sale be conducted with entire good faith, and with reasonable regard for the mortgagor's interest, but it is not required that the land be sold for full value. All that is required is that a reasonable effort be made to prevent a sacrifice, and if it is through the mortgagor's fault that the land is bid off for less than has before been offered for it, he cannot complain of inadequacy of the price: Stevenson v. Dana, 166 Mass. 163, 44 N. E. 128. It has been held that a trustee's sale of land for one-fifth of its value is not so grossly inadequate as to raise a presumption of fraud: Harlin v. Nation, 126 Mo. 97, 27 S. W. 330. The fact that property was taken a few years before the sale as security for twice the amount of money bid and paid at the sale, and that it sold three years thereafter for three times that amount, is not evidence of such inadequacy in the price obtained at the sale as to avoid it: Parmly v. Walker, 102 Ill. 617. A sale of a greater amount than the secured debt is valid, and will not be set aside for inadequacy of price in the absence of a showing of bad faith: Savings etc. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. It is no ground for setting aside a sale of land under a power contained in a mortgage authorizing the mortgagee to purchase, that he arranged with a third person to bid a sum not less than the mortgage debt and expenses: Dexter v. Shepard, 117 Mass. 480. In such case the fact that the mortgagee purchased the property through an agent at the sale for less than its value, and that no other bidders were present, does not make the sale invalid on the ground of inadequacy of price: Learned v. Geer, 139 Mass. 31, 29 N. E. 215. If the premises are sold to the mortgagee's agent for less than he was instructed to bid, but it does not appear that they were worth a greater amount than such bid, a resale will not be ordered on account of inadequacy of price: Middlesex Banking Co. v. Lester, 7 S. Dak. 333, 64 N. W. 168, especially in the absence of a showing that a larger price could be obtained on a resale: Farmers' Bank v. Quick, 71 Mich. 534, 15 Am. St. Rep. 280, 39 N. W. 752. A sale of land under a power in a trust deed for nearly its appraised value for the purposes of taxation will not be set aside for inadequacy of price: Mahoney v. MacKubin, 52 Md. 357. One who purchases without knowledge of a duly recorded trust deed and without knowledge of a trustee's sale thereunder is not entitled to have the sale set aside for inadequacy of price although the property would have brought more if it had been sold at private sale: Shaw v. Holloway, 13 Tex. Civ. App. 254, 35 S. W. 800. A subsequent encumbrancer has no right to set aside a sale under a power contained in the first mortgage, on account of inadequacy of consideration, if the sale was in all other respects fair: Hardwicke

v. Hamilton, 121 Mo. 465, 26 S. W. 342. A mortgagor who, without being misled by the mortgagee or otherwise, carelessly assumes that a sale of his premises, whereof he has no notice, is not under his mortgage, and he fails to attend the sale, has no equity to have it set aside, although there is an inadequacy of price: *King v. Bronson*, 122 Mass. 122.

b. **When Affects Sale.**—While a sale under a power contained in a mortgage, if otherwise unobjectionable, will not generally be set aside for inadequacy of price alone, yet if the sum reported is so grossly inadequate as to indicate fraud or a want of reasonable judgment and discretion in the trustee by which the property is sacrificed, the sale may, on timely application be vacated and a resale ordered: *Horsey v. Hough*, 38 Md. 130; *Chilton v. Brooks*, 69 Md. 584. 16 Atl. 273; *Vail v. Jacobs*, 62 Mo. 130; *Holdsworth v. Shannon*, 113 Mo. 508, 35 Am. St. Rep. 719, 21 S. W. 85. It is the duty of the mortgagee as trustee to obtain an advantageous sale of the property for the benefit of all the parties interested, and if he fails in this respect and reports himself as the purchaser at a gross depreciation in the value of the property, the sale must be set aside: *Horsey v. Hough*, 38 Md. 130; *Runkle v. Gaylord*, 1 Nev. 123. This is especially so if other irregularities are shown in connection with the sale: *Lalor v. McCarthy*, 24 Minn. 417.

It has been held that mere inadequacy of price is not sufficient to set aside the sale unless it is so gross as to furnish evidence of fraud. There must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it: *Newman v. Meek*, 1 Freem. Ch. 441; *Carter v. Abshire*, 48 Mo. 300. Under this rule a sale of the property for less than two-thirds of its appraised value has been held void for inadequacy of price: *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126. So has a sale for one-third of the value of the property: *Runkle v. Gaylord*, 1 Nev. 123; and also one for one-fifth of the value of the premises: *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245. If the price obtained is so grossly inadequate as to show an absolute sacrifice of the property, the sale will be set aside: *Stacy v. Smith*, 9 S. Dak. 137, 68 N. W. 198. If the property is sold for only two-thirds of its value, and at least one purchaser is kept away through the direct agency of the mortgagee, this is sufficient to vacate the sale: *Loeber v. Eckes*, 55 Md. 1. So, if the sale under a trust deed is for a grossly inadequate price, it will be set aside at the suit of the debtor, if bidding was prevented by the fact that the beneficiary held a tax title to the property: *Martin v. Swofford*, 59 Miss. 328. If the owner of the mortgage agrees to buy the land at the sale for a certain amount, but instead it is sold for a grossly inadequate price, which is suffered in reliance upon such agreement, the sale may be set aside, regardless of the validity of

such agreement: *Fix v. Loranger*, 50 Mich. 199, 15 N. W. 81; *Helm v. Yerger*, 61 Miss. 44. If a mortgage with power of sale is foreclosed and the property bid in for a grossly inadequate price, and then sold to a purchaser at a slight advance, both the mortgagee and the purchaser knowing that the mortgagor was insane when the sale was made, it must be regarded as fraudulent, and may be set aside: *Eneking v. Simmons*, 28 Wis. 272. In *Meyer v. Kuechler*, 10 Mo. App. 371, it was, however, held that the sale of property under a deed of trust for much less than its value, and the insanity of the mortgagor at the date of the sale, is not ground for setting it aside, if competition among bidders was not thereby prevented.

V. Sales in Mass or in Parcels.

If a trust deed containing a power of sale authorizes the trustee to sell the premises without directing whether they shall be sold en masse or in parcels, he is clothed with a wide and sound discretion as to whether he will sell as a whole or in parcels, and when such discretion is wisely exercised, the manner of the sale is no ground for setting it aside. The trustee being the agent of both parties to the trust deed, it is his duty to sell the land as a whole or in separate parcels as will be conducive to its bringing the most money. It is his duty to sell it in such manner as to get the best price for it: *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544; *Chase v. Williams*, 74 Mo. 429; *Terry v. Fitzgerald*, 32 Gratt. 843. There is a discretion vested in the trustee to sell in the manner which produces the largest sum, and a sale of the entire land as a whole will not be disturbed simply because the land was not sold in parcels, unless in addition there was fraud, unfair dealing or abuse of discretion: *Lazarus v. Caesar*, 157 Mo. 199, 57 S. W. 751. Where power is given a trustee to sell land upon default being made in the payment of a debt secured by trust deed, and the grantor has not provided for its sale in parcels, a sale of the entire tract en masse will not be set aside if that was more judicious than a sale in parcels, or if the interest of the debtor was thereby promoted: *Singleton v. Scott*, 11 Iowa, 589. The mere fact that property which is susceptible of division has been sold in mass does not render the trustee's sale void. It is only when substantial injury has been inflicted by a failure to subdivide and sell in parcels that such sale may be set aside: *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328; *Benkendorf v. Vincenz*, 52 Mo. 441; *Chesley v. Chesley*, 54 Mo. 347; *German Bank v. Stumpf*, 73 Mo. 311; *Snyder v. Chicago etc. Ry. Co.*, 131 Mo. 568, 33 S. W. 67; *Kline v. Vogel*, 11 Mo. App. 211; *Swenson v. Halberg*, 1 McCrary, 96, 1 Fed. 444. Fraud or prejudice to some one interested must be shown as the result of the failure of the trustee to sell in separate parcels, before equity will set aside the sale on that ground: *Kerfoot v. Billings*, 160 Ill. 563, 41 N. E. 804. As a general rule, if the land is in parcels, distinctly marked for separate and distinct enjoyment, it is the duty of the

person making the sale to subdivide and sell it in such parcels. But if it consists of a single lot containing a certain number of acres, used and adapted as a family residence, and not shown to have been susceptible of being advantageously cut up into parcels, and the mortgagor expresses no desire to have it subdivided, and the mortgage does not stipulate that only so much of it shall be sold as may be necessary to discharge the debt, the general rule does not apply, and the sale will not be set aside on the ground that the lot was not divided or subdivided: *Mahone v. Williams*, 39 Ala. 202. If at the time of the deed of trust is executed the property consists of one parcel it may be sold as a whole, although it has prior to the sale been subdivided by the debtor for purposes of his own: *Durm v. Fish*, 46 Mich. 312, 9 N. W. 429; *Lamerson v. Marvin*, 8 Barb. 9. If the property conveyed by the deed of trust is situated outside city limits, in a residence district, and is not larger in quantity than is desirable for a residence, failure of the trustee to divide the land into parcels and thus sell it, if there is nothing in the deed imposing such duty, is no ground to avoid the sale: *Cleaver v. Green*, 107 Ill. 67. The debtor complaining that such sale is void because separate lots were sold as one parcel has the burden of proof to show that they were not occupied as one parcel, and it is not sufficient to show that part of one lot was fenced and cultivated and that the adjoining lot was not fenced: *Harris v. Creveling*, 80 Mich. 249, 45 N. W. 85. If an agreement is inserted in the deed of trust that the property shall be sold in mass, and it is so sold and conveyed to a third person, the sale cannot be set aside and the mortgagor permitted to redeem on the ground that his misfortune and the stringency of financial matters forced him to agree to such condition: *Dunn v. McCoy*, 150 Mo. 548, 52 S. W. 21. If the title to the land is vested in the trustee by virtue of two trust deeds executed by the same person as beneficiary, each deed being for an undivided half of the land, the whole should be sold together under both deeds, and not one-half at one time and the other half at another: *Coffman v. Scoville*, 86 Ill. 300. Although the premises covered by the deed of trust consist of two distinct parcels or tracts of land, yet if they constitute but one farm they may be properly sold in gross as a single tract: *Merrill v. Nelson*, 18 Minn. 366; *Kellogg v. Carrio*, 47 Mo. 157; *Maxwell v. Newton*, 65 Wis. 261, 27 N. W. 31. If the lands lie contiguous and in one body, they may, when sold under the power contained in the mortgage, be sold as one tract and need not be sold in separate parcels as described in the mortgage: *Worley v. Naylor*, 6 Minn. 123.

If, however, the land will bring a better price by dividing it, and selling it in separate lots, and the owner desires and requests that that be done, and the trustee refuses, the former may invoke the intervention of a court of equity, in a proper case, to control the trustee in the exercise of his discretion: *Terry v. Fitzgerald*, 32 Gratt. 843.

Thus, if the trust deed authorizes the trustee to sell the premises "entire without division, or in parcels," as he may think best, this will not prevent the owner from insisting that it was the duty of the trustee to offer the property in parcels, and if it is shown that a sale in parcels would have been more advantageous, and that the trustee was requested to so offer it for sale, a sale en masse must be set aside on a bill by the grantor in the trust deed, as the latter does not vest arbitrary discretion in the trustee: *Cassidy v. Cook*, 99 Ill. 385. The rule is firmly established that a trustee selling land under a trust deed is trustee for both parties, and is bound to adopt all reasonable means to render the sale under his power most beneficial to the debtor. If the property is susceptible of division and will bring more by sale in separate parcels or lots, or where a sale of a part will bring an amount sufficient to pay the debt secured, he is bound to sell accordingly, and if he does not the sale will be held invalid on application of the person aggrieved. If, however, the land will sell for more as a whole than in parcels or lots, the trustee is entitled to exercise a sound discretion as to the mode of selling: *Tatum v. Holliday*, 59 Mo. 422. This is the rule, notwithstanding any direction as to the manner of sale that may be contained in the trust deed: *Carter v. Abshire*, 48 Mo. 300. Under this rule, if, subsequently to the execution of the deed of trust, the trust property is subdivided into lots, and a third person acquires the grantor's interest in a part thereof, the trustee in making sale of the property should first offer for sale the lots remaining in the grantor, and primarily liable for the debt, unless some good reason to the contrary exists, and if they fail to sell when thus offered, they may then be offered as a whole, but they should not be so offered in the first instance: *Meacham v. Steele*, 93 Ill. 135. If the property mortgaged as a whole has subsequently been subdivided by the location of a railroad through it, the two parcels should be sold separately, and if one of them will bring enough to satisfy the whole mortgage debt, the other parcel should not be offered for sale: *Patterson v. Miller*, 52 Md. 388. Under the Michigan statute, if the premises consist of several parcels not adjoining each other, the sale of such parcels under a power contained in a mortgage must be of each parcel separately, and the deed given in pursuance of the sale must show the price at which each parcel sold: *Lee v. Mason*, 10 Mich. 403; *Morse v. Ryam*, 55 Mich. 595, 22 N. W. 54; *Keyes v. Sherwood*, 71 Mich. 516, 39 N. W. 740. If the trustee is given power to sell the whole, or so much of the trust property as may be necessary to satisfy the debt secured, he may properly divide it into lots, and if the proceeds of the sales of the property thus sold equal the aggregate value of the whole property, the sale is valid and will not be disturbed: *Gray v. Shaw*, 14 Mo. 341. If distinct mortgages are given on separate lots to secure several and distinct debts, and for the convenience of all such mortgages are consolidated in one writing, a sale of all the lots together as one entire tract for a gross sum, is unauthorized and void:

Hull v. King, 38 Minn. 349, 37 N. W. 792. While if several separate and distinct tracts of land are covered by one mortgage as security for one debt, they should, when sold under the power contained in the mortgage, be sold in parcels, yet a sale in such case in gross and as one parcel of such distinct tracts is not void, but voidable only for good cause shown, as that the sale was the result of fraud, or that prejudice resulted therefrom to the mortgagor or owner of the equity of redemption: Willard v. Finnegan, 42 Minn. 476, 44 N. W. 985; Ryder v. Hulett, 44 Minn. 353, 46 N. W. 559; Clark v. Kraker, 51 Minn. 444, 53 N. W. 706. On the other hand, if the mortgaged farm consists of a quarter section of land in one parcel, it should be sold en masse, but a sale of it in forty-acre lots is not, because it is thus sold in parcels, void, but it is a mere irregularity, to be taken advantage of only by some interested person who shows himself injured thereby: Middlesex Banking Co. v. Lester, 7 S. Dak. 333, 64 N. W. 168. If the mortgage covers an exempt homestead, and also additional lands, the mortgagor is entitled, when the land is sold under the power contained in the mortgage, to have the non-exempt property first sold, and the proceeds applied to the satisfaction of the mortgage debt: Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031.

VI. Postponement of Sale.

As has been before said, the trustee in a deed of trust with power of sale is the trustee of the debtor, as well as of the creditor, and his relation imposes the duty of acting fairly, honestly, and for the best interests of all persons having rights in the property pledged, and in making the sale under the power he must use all reasonable efforts to protect their several interests, and for this purpose he must use the same effort that prudent men employ for the protection of their own interests. For this reason it is the right and duty of a trustee, in the exercise of a sound discretion, to adjourn the sale, whenever, from any cause, a reasonably advantageous price cannot be had, and when it is necessary to prevent a great sacrifice of the property: Thornton v. Boyden, 31 Ill. 200; Griffin v. Marine Co., 52 Ill. 130; Richards v. Holmes, 18 How. 143. And the rule prevails that, under a mortgage of land containing a power of sale, the mortgagee may, in the exercise of a sound discretion, adjourn the sale from time to time, to enable him to obtain a better price for the property: Dexter v. Shepard, 117 Mass. 480. The fact that a sale authorized under a deed of trust is postponed for three years does not raise such presumption of fraud as will avoid it, if no possession of the land conveyed, or other benefit, is reserved to the grantor: Starke v. Etheridge, 71 N. C. 240. A refusal to postpone the sale at the request of the mortgagor, or if the sale is postponed and the property sold before the hour set for the sale, this may sometimes render the sale fraudulent and void. Thus if, upon the day of

sale, few persons are present, and the mortgagor applies to the trustee to delay the sale as long as possible, and the latter promises not to sell until a certain hour of the day, whereupon the mortgagor leaves the premises, and the trustee then proceeds to sell to the mortgagee for one-fifth of the value of the property, before the hour to which he had promised to adjourn the sale, the sale is fraudulent and void: *Hoppes v. Cheek*, 21 Ark. 585; *Ventres v. Cobb*, 105 Ill. 33. In the exercise of a sound discretion the trustee or mortgagee may refuse to adjourn the sale, and such refusal is not ground for avoiding the sale, unless some material injury to the debtor is shown to result therefrom. Thus, if it is not shown that the mortgagor would have secured the money with which to meet the debt or interest, if the trustee had complied with his request to postpone the sale for two days, or that such postponement would have done him any good, or that the property would have brought a better price, the sale cannot be set aside because the request for a postponement was denied: *Dunn v. McCoy*, 150 Mo. 548, 52 S. W. 21. Although the land is sold at a somewhat reduced price, just after a disastrous overflow, and after the mortgagor has asked for a postponement of the sale, the sale will not be disturbed if default had taken place some time before, and there is no reason for believing that the sale could have been averted if the overflow had not taken place, or that a better price could have been obtained if the sale had been postponed: *Dunton v. Sharpe*, 70 Miss. 850, 12 South. 800. The fact that it rained in the early morning of the day of sale, but had cleared at the time it took place, is no ground for avoiding the sale for a refusal to postpone, if it appears that the fact of the rain did not keep bidders away, nor deter them from bidding at the sale: *Mahoney v. MacKubin*, 52 Md. 357. If the notice of sale is sufficient, and there are several bidders at the sale, and more than the mortgage debt and interest is obtained, the mortgagee is under no obligation to adjourn the sale, though if the notice had been published in a paper of wider circulation more bidders might have been present at the sale: *Stevenson v. Hano*, 148 Mass. 616, 20 N. E. 200.

a. Notice of Postponement.—If the mortgage sale is for any reason postponed, it is the duty of the trustee or mortgagee to give sufficient notice of such postponement and of the day when the postponed sale will take place, and it must take place on that day, and if the mortgagee adjourns the sale to another day, and the notice of such postponement as published is for a different and more distant day, on which the sale is made, such sale is irregular and void: *Miller v. Hull*, 4 Denio, 104. Although notice of the postponement of the mortgage sale need not be served personally: *Westgate v. Handlin*, 7 How. Pr. 372; yet some cases hold that the notice of postponement must be for the same length of time as that required in the first instance for the original time of sale: *Thornton v. Boyden*, 31 Ill. 200;

Griffin v. Marine Co., 52 Ill. 130; but it seems that notice of adjournment of the sale under a power contained in a mortgage need not be as minute and specific as the original notice: *Dexter v. Shepard*, 117 Mass. 480. If notice of postponement of the sale is given, and the sale takes place at the time mentioned in and pursuant to the original notice of sale, the sale as made is thereby rendered irregular and void: *Jackson v. Clark*, 7 Johns. 218. If, however, adjournments of the mortgage sale have been made from time to time, at the request of the mortgagor who has had sufficient notice thereof to protect his interests, he cannot object that the notices of adjournment were not given in proper form, and if it is shown that the mortgagee honestly believed that no further reasonable postponements would be likely to produce higher bids, the fact that the land was worth more than the mortgage and more than it brought at the sale when finally made, is not ground upon which to impeach the sale: *Stevenson v. Dana*, 166 Mass. 163, 44 N. E. 128.

If, at the time and place named for the sale under a first mortgage no bidders are present, and such sale is adjourned to another time, and afterward several adjournments are had on account of the absence of bidders, and no notice of any of such adjournments is given except by oral proclamation, and, some three months after the time named in original notice, the land is purchased by the agent of the mortgagee at a great sacrifice, such sale is fraudulent as to the second mortgagee, as to whom the first mortgagee had failed to keep his promise to notify him of the time and place when the sale would actually take place, and such second mortgagee is, under such circumstances, entitled to redeem the land from the first mortgage: *Clark v. Simmons*, 150 Mass. 357, 23 N. E. 108.

VII. Terms of Sale.

Although the mortgage provides that the sale must be for "cash," the mortgagor cannot complain that the mortgagee sold for credit, or that he agreed to give time to the purchaser, whether such arrangement is made before or after the sale. As it is almost universal that a sale on credit will produce a better price than a sale for cash, the sale of the mortgaged premises on credit cannot possibly injure the mortgagor, and therefore constitutes no ground for setting aside the sale: *Mahone v. Williams*, 39 Ala. 202; *Whitfield v. Riddle*, 78 Ala. 100; *Newburn v. Bass*, 82 Ala. 622, 2 South. 520; *Markey v. Langley*, 92 U. S. 142. If the mortgage authorizes the mortgagee or trustee to sell for cash, and he sold on credit, with the acquiescence of the beneficiary who received the benefit of the bid, a third person cannot assail the purchaser's title because the sale was not made for cash: *Jones v. Hagler*, 95 Ala. 529, 10 South. 345. A departure from the terms of sale as prescribed by the power in the mortgage, from a cash sale to one partly for cash and partly on credit, is not sufficient ground of objection to avoid the sale: *Sawyer v. Carpenter*,

130 Ill. 187, 22 N. E. 458; Hubbard v. Jarrell, 23 Md. 66. In the case of Mead v. McLaughlin, 42 Mo. 198, it appeared that under the terms of a trust deed the real estate therein mentioned should have been sold for "cash." Subsequently to the execution of the trust deed and prior to the sale the property became encumbered with various liens, and at the sale the purchaser paid for the property only a portion of the sum named as the purchase money, giving his notes to the holders of the liens for the balances due them, over and above the amounts realized by them at the sale, and, in consideration of these notes, the lienholders yielded up all claims against the mortgagor. It was held that the notes so given were equivalent to cash placed in the hands of the trustee, and that the debtor had no ground of complaint. If no terms are imposed in the mortgage the sale under the power contained therein may be for cash or on credit as seems best for the interest of the parties concerned: Powell v. Hopkins, 38 Md. 2; and if no terms are thus imposed, the mortgagee, in making sale under the power, may give credit to the purchaser for the purchase money, but in case the sum for which the land is sold is more than the sum secured by the mortgage, it seems that the mortgagee is liable to pay the surplus in cash to the owner of the equity of redemption: Bailey v. Aetna Ins. Co., 10 Allen, 286.

Some cases hold that if a trustee is required by the trust deed to sell for cash upon default in the payment of the money for which the deed is given, he cannot sell on credit, and if he does, the sale may be set aside as void. This holding is based upon the principle that such trustee has no power to impose new terms or conditions, or to alter or vary those contained in the deed: Cassell v. Ross, 33 Ill. 244, 85 Am. Dec. 270; Arnold v. Greene, 15 R. I. 348, 5 Atl. 503. If the sale is required to be for cash, a sale to a third person, to hold for the benefit of the trustee, is fraudulent and may be avoided: Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131. If the holder of the notes secured by the deed of trust becomes the purchaser of property at the trustee's sale, a mere indorsement of the amount of his bid on the notes is a sufficient compliance with the power and terms of sale requiring it to be for cash: Jacobs v. Turpin, 83 Ill. 424; Beal v. Blair, 33 Iowa, 318. A sale of mortgaged premises under a power to sell for cash is satisfied by a sale whereat the purchaser gives his check for the price bid by him, which would have been paid if presented: McConneughey v. Bogardus, 106 Ill. 321. If the trust deed provides for a sale for cash, and the creditor instructs the trustee to accept in payment only gold or silver or legal currency, the announcement of that fact at the sale before bids are received will not in the absence of fraud vitiate the sale: Lallance v. Fisher, 29 W. Va. 512, 2 S. E. 775.

A sale of land, under a power contained in a second mortgage, of the entire estate free from encumbrance has been held invalid: Dono-

lue v. Chase, 130 Mass. 137. And the deed under such sale operates only as an assignment of the second mortgage to the purchaser: Deamaley v. Chase, 136 Mass. 288. If at a mortgage sale the property is offered free of encumbrances and the purchaser bids with that understanding at the full value of the property, he cannot be compelled to accept the title when the property is encumbered with a prior mortgage or mortgages: Mayer v. Adrian, 77 N. C. 83. If the property is purchased under a statement made by the person selling that the premises are to be sold free of all encumbrances, and it afterward appears that there are mechanics' liens against it, the purchaser is not compelled to accept the title, and is entitled to be relieved from the effect of his bid: Schaeffer v. Burd, 70 Md. 480, 17 Atl. 375. If under the terms of sale the property is to be sold clear of encumbrances, the purchaser to pay out of the amount bid by him a prior mortgage upon the premises, and the mortgagee becomes the purchaser for a sum insufficient to pay the prior mortgage, his own and costs, out of which he pays such prior mortgage, he cannot be compelled to pay over to the mortgagor as surplus the difference between the sum bid and the amount of his mortgage, with costs: Story v. Hamilton, 86 N. Y. 428. A stipulation in a mortgage or trust deed that the property may be sold, in case of default in payment free from the equity of redemption is valid and may be enforced: Knox v. McCain, 13 Lea, 197. Or if the amount of prior liens is certain and ascertained, the sale may include the equity of redemption: Curry v. Hill, 18 W. Va. 370. The sale may include the amount of the attorney fee in the sum for which the land is sold: Emmons v. Van Zee, 78 Mich. 171, 43 N. W. 1100.

VIII. Laches.

If a sale under a power is voidable at the election of the mortgagor for some irregularity attending the sale, such as that the mortgagee purchased without authority, that there was an inadequacy in the price obtained, want of sufficient or proper notice or the like, he must institute proceedings within apt and reasonable time to avoid the sale, or his laches will bar him of relief. What in such case is a reasonable time must necessarily depend upon the circumstances of the particular case, but to institute such proceeding long after the sale when the rights of third parties have intervened, and improvements have been made is always deemed laches on the part of the mortgagor or those claiming under him: Ezzell v. Watson, 83 Ala. 120; Woodruff v. Adair, 131 Ala. 530, 32 South. 515; Gibbons v. Hoag, 95 Ill. 45; Nichols v. Otto, 132 Ill. 91, 23 N. E. 411; Cernell v. Newkirk, 144 Ill. 241, 33 N. E. 37; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447. Some courts have judicially fixed two years as reasonable time in which the mortgagor must institute proceedings to avoid the mortgage sale for any irregularity therein, and

have decided that a longer delay, in the absence of special and equitable circumstances, is such laches as will bar relief: *Ezzell v. Watson*, 83 Ala. 120, 3 South. 309; *Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55, 7 South. 238; *Lovelace v. Hutchinson*, 106 Ala. 417, 17 South. 623; *Woodruff v. Adair*, 131 Ala. 530, 32 South. 515. In Minnesota the time is fixed as five years from the time of the sale: *Russell v. Lumber Co.*, 45 Minn. 376, 48 N. W. 3; *Bitzer v. Campbell*, 47 Minn. 221, 49 N. W. 691; *Mogan v. Carter*, 54 Minn. 141, 55 N. W. 1117. Such limitation does not, however, apply to a sale which is absolutely void: *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333. The mortgagor is not required to bring an action to set aside an unauthorized mortgage sale before the expiration of the year for redemption: *Hull v. King*, 38 Minn. 349, 37 N. W. 792. It has been held that if a mortgagor knowing all of the circumstances surrounding the sale waits eighteen months thereafter before bringing suit to set it aside he is guilty of laches: *Corrothers v. Harris*, 23 W. Va. 177. Where no steps are taken by the mortgagor or those claiming under him for more than five years to set aside a sale, under a power in a mortgage, during which time a third person becomes a purchaser in good faith, relying on the validity of the sale, and from year to year expends money on the land, such laches will exclude all inquiry into mere irregularities which would have rendered the sale voidable if steps to that end had been taken in seasonable time: *Gibbons v. Hoag*, 95 Ill. 45. Under such circumstances a delay of four years has been deemed laches, barring relief: *Cornell v. Newkirk*, 144 Ill. 241, 33 N. E. 37. In such case the mortgagor must, in order to avoid the sale for mere irregularities, act with promptness and not wait four years to speculate upon the chances of a rise in the value of the property: *Hoyt v. Pawtucket Institution of Savings*, 110 Ill. 390. A delay of seven years after the sale cuts off the mortgagor's equity to avoid it for mere irregularities in the absence of fraud, or any special equitable excuse for delay: *Dempster v. West*, 69 Ill. 613. A delay of from fourteen to sixteen years in making application to set aside the sale shows such gross laches that the petition will not be given a hearing: *Emmons v. Van Zee*, 78 Mich. 171, 43 N. W. 1100; *Bergen v. Bennett*, 1 Caines Cas. 1, 2 Am. Dec. 281; *Hughes v. Caldwell*, 9 Leigh, 342. In some cases the right of the mortgagor to avoid the sale for irregularities has been extended to what seems to us an unreasonable time. Thus it has been held that the right of the mortgagor to avoid a sale under a power, where the mortgagee has indirectly become the purchaser, is not barred by his laches for a shorter period than the statutory limitation of ten years: *Jones v. Pullen*, 115 N. C. 465, 20 S. E. 624. And in such case a delay of seventeen years was not deemed laches, where the land had remained unimproved with no increase in value: *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458.

IX. Bids and Bidders.

As has been shown, a trustee or mortgagee selling under a power contained in a trust deed or mortgage is bound to act in good faith and adopt all reasonable modes of proceeding in order to render the sale beneficial to the debtor: *Grover v. Fox*, 36 Mich. 461; *Chesley v. Chesley*, 49 Mo. 540; *Tatum v. Holliday*, 59 Mo. 422; and when enough has been bid for a portion of the premises to satisfy the entire debt and costs, the power of the trustee or mortgagee is generally at an end, and he can sell no more: *Johnson v. Williams*, 4 Minn. 260; *Baker v. Halligan*, 75 Mo. 435; *Miller v. Mann*, 88 Va. 212, 13 S. E. 337. And the rule is well established everywhere that anything done by the parties to the sale calculated to keep bidders away, or prevent competition, renders the sale void: *Longwith v. Butler*, 8 Ill. 32; *Mapp v. Sharpe*, 32 Ill. 13; *Miltenger v. Morrison*, 39 Mo. 71; *Jackson v. Crafts*, 18 Johns. 110. The person selling is not, however, when the sale is otherwise regular, required to make any personal effort to procure the attendance of bidders at the sale: *Harlin v. Nation*, 126 Mo. 97, 27 S. W. 330. If the mortgagee does use personal effort to get bidders at the sale, and the mortgagor knows of the sale and attends it and twice makes a bid which he does not make good, while protesting against the sale, and the property is then bid off for considerably less than has been offered for it before, he is not entitled to avoid the sale: *Stevenson v. Dana*, 166 Mass. 163, 44 N. E. 128. If the power requires that the sale be for cash, payment or tender of the final bid in cash is essential to the sale; and a person, although the highest and best bidder at the time the property is knocked off, is not entitled to a conveyance unless the amount of his bid is tendered in cash, immediately after the property is knocked off to him, or at least during the legal hours of sale on the day upon which the sale is made: *Dwelle v. Blackshear Bank*, 115 Ga. 679, 42 S. E. 49. A sale under a mortgage is not legal unless it is shown that the bidder to whom the property was knocked down tendered the amount of his bid, or received a deed: *McKarsie v. Citizens' etc. Assn. (Tenn.)*, 53 S. W. 1007. If land is sold under a deed of trust for cash, and the debtor bids the highest price therefor, which he is unable to pay, it is not error to sell to the next highest bidder: *Maloney v. Webb*, 112 Mo. 575, 20 S. W. 683. Or if the trustee sells for cash and the land is knocked off to a bidder who fails to make payment, he may reopen the sale, and sell to the next highest bidder: *Davis v. Hess*, 103 Mo. 31, 15 S. W. 324. If the bidder withdraws his offer, or is irresponsible, or refuses to pay his bid, while other bidders are still present, the sale may properly be reopened, especially if some other person promises a higher bid: *Miller v. Miller*, 48 Mich. 311, 12 N. W. 209. If the mortgagee, upon the failure of one bidder to comply with his bid, immediately puts the premises up for sale again in the mortgagor's presence, who does

object, and sells it for a less sum than was previously bid, this is no ground for avoiding the sale: *Wing v. Hayford*, 124 Mass. 249.

If the purchaser fails or refuses to comply with his bid, he is liable for the difference between the amount of his bid and the price obtained on the resale: *Gardner v. Armstrong*, 31 Mo. 535; *Gross v. Janesox*, 16 Daly, 346; *Fleming v. Holt*, 12 W. Va. 143.

A purchaser who has purchased at a mortgage sale and has deposited his bid under an agreement that it shall be forfeited to the seller, if he fails to comply with the terms of sale, cannot recover his deposit on his failure to comply with his bid: *Donohue v. Parkman*, 161 Mass. 412, 42 Am. St. Rep. 415, 37 N. E. 205.

If the person conducting the sale agrees to advance the money to the purchaser, and tells the mortgagee that the money is ready for him, this has the same effect as if the purchaser had in fact paid the amount of his bid: *Muhlig v. Fiske*, 131 Mass. 110.

X. Presence of Trustee or Mortgagee.

Some of the authorities maintain that a trustee or mortgagee selling under a power must in person supervise and watch over the sale of the trust property. That he cannot act through an agent in such sale unless the deed of trust or mortgage expressly authorizes the delegation of such power, and that if the power of sale is delegated to an agent without such authorization the sale as thus made is void: *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291; *Spurlock v. Sproule*, 72 Mo. 503. In such case the absence of the trustee or mortgagee from the sale under the power renders such sale void: *Vail v. Jacobs*, 62 Mo. 130; *Briekenkamp v. Rees*, 69 Mo. 426; *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. 999. It has been held that the fact that the trustee was not personally present when the property was sold, though near at hand and easily accessible, if needed for any purpose, is a circumstance that may be considered with others for the purpose of avoiding the sale: *Wicks v. Westcott*, 59 Md. 270. The absence from the sale of one of two trustees is not, however, sufficient reason of itself for setting aside the sale, otherwise fair and advantageous: *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. Rep. 50. And we think the better rule is that the personal attendance by the trustee or mortgagee selling under the power contained in a trust deed or mortgage is not essential to the validity of the sale. He may delegate the power to and act through others in advertising and making the sale without express authority in the power, and all that is necessary is that the terms of the trust deed or mortgage as to making the sale shall be complied with, and that the trustee shall approve the sale and execute the conveyance: *Kennedy v. Dunn*, 58 Cal. 339; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263, 6 South. 840; *Dunton v. Sharpe*, 70 Miss. 850, 12 South. 800; *Connolly v. Belt*, 5 Cranch C. C. 405, Fed. Cas. No. 3117. It

has been held that though the trustee may employ an auctioneer to make the sale, he must himself be present and supervise it for the best interests of the parties, and to prevent a sacrifice of the property: *Taylor v. Hopkins*, 40 Ill. 442. Other cases, however, hold that a mortgagee may employ an auctioneer to make the sale in his absence, and such sale is valid if fairly conducted: *Fogarty v. Sawyer*, 23 Cal. 570; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928. The mortgagor may delegate the power to sell to a sheriff or deputy sheriff in his absence, and the sale as thus made, if otherwise fair and legal, is valid: *Berthold v. Holman*, 12 Minn. 335, 93 Am. Dec. 234; *Heinmiller v. Hatheway*, 60 Mich. 391, 27 N. W. 558. If the sale is conducted by the attorney of the mortgagee who subsequently ratifies it by making the necessary deed for the property, the mere fact that the sale was conducted by the attorney in the absence of the mortgagee, will not render void the title derived thereby: *Parker v. Banks*, 79 N. C. 480.

XI. Effect of Sale on Equity of Redemption.

Generally, the effect of a sale fairly made under a deed of trust containing a power to sell, or by a mortgagee or his assignee under a power contained in the mortgage, is to cut off the equity of redemption of the mortgagor, and this whether the mortgagee or some third person becomes a purchaser at the sale, and regardless of the fact whether the purchaser receives a deed or merely a certificate or some evidence of purchase: *McGuire v. Van Pelt*, 55 Ala. 344; *Harris v. Miller*, 71 Ala. 26; *Gassenheimer v. Molton*, 80 Ala. 521, 2 South. 652; *Brunson v. Norgan*, 84 Ala. 598, 4 South. 589; *Woodruff v. Adair*, 131 Ala. 530, 32 South. 515; *Crittenden v. Johnson*, 11 Ark. 94; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Jacoby v. Crowe*, 36 Minn. 93, 30 N. W. 441; *Osborn v. Merwin*, 12 Hun, 332; *Paschal v. Harris*, 74 N. C. 335; *Brisbane v. Stoughton*, 17 Ohio, 482; *Grandon v. Emmons*, 10 N. Dak. 223, 86 N. W. 723. If lands are fairly and honestly sold under a power contained in a mortgage, the sale cuts off the equity of redemption as effectually as a sale under a decree of foreclosure in equity: *Gassenheimer v. Molton*, 80 Ala. 521, 2 South. 652. A sale of land under a power contained in a mortgage, the mortgagee becoming the purchaser, but receiving no deed from the trustee, effectually cuts off the equity of redemption, and if the validity of the sale is not impeached by the mortgagor within the time allowed by law, the mortgagee, or an assignee and purchaser claiming under him, may maintain an action to compel a divestiture of the legal title: *Brunson v. Morgan*, 84 Ala. 598, 4 South. 589. If the mortgagee becomes the purchaser at such sale, at a bid less than the mortgage debt, the equity of redemption is barred and cut off, and the mortgage debt is thereby satisfied and extinguished to the extent of the amount of the mortgagee's bid, by mere operation of law: *Harris v. Miller*, 71 Ala. 26. The equity of the mortgagor is

extinguished by a sale and conveyance made in accordance with the power contained in the mortgage: *Bloom v. Van Rensselaer*, 15 Ill. 503. If lands are sold under a power contained in a trust deed, with no agreement to still regard the land merely as security, the equity of redemption is cut off by the sale regularly conducted, and by the trustee's deed: *Ryan v. Sanford*, 25 Ill. App. 571, affirmed in 133 Ill. 291, 24 N. E. 428. If a bona fide sale is made under a power of attorney, executed by the mortgagor to a third person, authorizing him to sell the premises upon default in payment of the mortgage debt, for the benefit of the mortgagee, such sale, if regularly made, divests the equity of redemption in the mortgagor and those claiming under him: *Brisbane v. Stoughton*, 17 Ohio, 482. After a sale of mortgaged premises by the mortgagee or his assigns under a power contained in the mortgage, the mortgagor's right and interests are wholly divested, and if he thereafter remains in possession, he is a tenant at sufferance: *Kinsley v. Ames*, 2 Met. 29.

XII. Effect of Defective Sale.

If a sale of the mortgaged premises under the power turns out to be defective, irregular, or invalid for any reason, and hence voidable at the election of the mortgagor, who has a right to redeem, a deed from the mortgagee to the purchaser clothes him merely with the mortgagee's lien on the land. He assumes the position of assignee of the mortgage: *Brown v. Smith*, 116 Mass. 108; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95; *Hoffman v. Harrington*, 33 Mich. 392; *Stackpole v. Robbins*, 47 Barb. 212; *Robinson v. Ryan*, 25 N. Y. 320; *Green v. Stevenson* (Tenn.), 54 S. W. 1011. An irregular sale under the power, though voidable, does not operate as a discharge of the debt and mortgage, but confers on the purchaser an equitable right to the security of the mortgage for the amount of the mortgage debt: *Rogers v. Barnes*, 169 Mass. 179, 47 N. E. 602; *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787. A defective sale under the power contained in the mortgage or trust deed operates as an assignment of the mortgagee's interest, and if the purchaser is in possession after condition broken, the mortgagor or owner of the equity of redemption cannot maintain ejectment against him before redemption is made: *Wilson v. South Park Commrs.*, 70 Ill. 46; *Brown v. Smith*, 116 Mass. 108. If upon default in the conditions of a trust deed a sale is made of the property covered thereby under the power contained therein, the sale, though irregular, subrogates the purchaser to all of the rights of the beneficiary in the deed: *Ingle v. Culbertson*, 43 Iowa, 265.

If the mortgage debt has been paid before the sale, the sale is voidable, and the purchaser obtains at most only a bare legal title, which he holds in trust for the benefit of the mortgagor or owner of the mortgaged estate: *Liddell v. Carson*, 122 Ala. 518, 26 South. 133; *Chicago etc. R. R. Co. v. Kennedy*, 70 Ill. 350;

Fleming v. Barden, 126 N. C. 450, 78 Am. St. Rep. 671, 36 S. E. 17. In those states where the payment of the debt extinguishes the mortgage securing it and the power of sale contained therein, any sale made under such power, after payment of the mortgage debt, will be void, even as against a bona fide purchaser, and after such sale the purchaser being in possession a court of equity may set aside the sale, and compel a reconveyance of the legal title, in order to remove the cloud on the mortgagor's title: Redmond v. Pakenham, 66 Ill. 434.

WAGNER v. GIBBS.

[80 Miss. 53, 31 South. 434.]

PUNITIVE Damages may be Awarded for an Assault and Battery though the defendant has been convicted and punished for the offense. (p. 599.)

EVIDENCE—Criminal Conviction as.—A Judgment of Conviction Entered on a Plea of Guilty to an affidavit charging the defendant with an assault and battery committed "willfully, maliciously, and unlawfully" is admissible in a civil action to recover for the same battery, because such plea, though not conclusive for want of mutuality, is competent as an admission of a solemn character made by the accused, and may support an award of punitive damages. (p. 599.)

ACTION FOR DAMAGES—Survivorship of Right to.—Punitive Damages for an assault and battery may be recovered, though the person injured has died, if the statute authorizes the personal representative to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. (p. 600.)

Action by an administratrix to recover for an assault and battery on her intestate by the defendant Wagner. Verdict and judgment in her favor for two thousand dollars, and the defendant appealed.

James Stone, T. T. Blount, and Earl Brewer, and McWillie & Thompson, for the appellant.

Shands, Somerville & Shands, J. G. McGowen, Hamner & West, and A. J. McLaurin, for the appellee.

⁶¹ **MAYES, S. J.** The appellant assigns for error the giving of the first instruction for plaintiff, which, in brief, informed the jury that they might, if they saw proper, award punitive damages. The first point made is that punitive dam-

ages cannot be allowed in civil cases for assault and battery, because the gravamen of the suit is what is also a criminal offense, and that the criminal punishment exhausts the liability to punishment as such. Several cases are cited in support of this proposition, but we prefer the other view. This court has previously held punitive damages to be recoverable in such suits. We do not, however, adhere to that view because of the doctrine of stare decisis, but because we see no good reason for departing from it, and it is in accord with the great weight of authority. It is so held in Arkansas, California, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, New York, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

It is also urged by the appellant that there is no evidence in this case to justify the infliction of punitive damages. It does appear that, after the assault was committed, appellant appeared before a magistrate and pleaded guilty to the offense, under an affidavit which charged that the assault and battery were committed "willfully, maliciously, and unlawfully." Appellant contends, however, that the conviction is only evidence of the conviction itself, and not of the substantive offense charged. The authorities cited by his counsel, and the reasoning in support of their contention, do not apply where the party has pleaded "guilty." Such plea is an admission by him⁶² of a solemn character. Because of the want of mutuality, he is not estopped thereby, but it is competent evidence against him. It may not be evidence of each fact alleged in the indictment or affidavit—mere allegations of surplusage—but it is evidence of each and every element needed to constitute the offense admitted as a crime. In assault and battery it admits the malice, because malice is implied by law in such case: *Albrecht v. State*, 62 Miss. 516; *Jamison v. Moseley*, 69 Miss. 478, 485, 10 South. 582. He may, because he is not estopped, defend by showing circumstances of excuse or justification, but in the case at bar no such effort was made. The case went to the jury on an assault and battery confessed, and no circumstances of excuse were even claimed to exist; and we hold that, in such state of the action, it was competent for the jury to award punitive damages. Nor does this holding conflict with *Jamison v. Moseley*, 69 Miss. 478, 10 South. 582, as claimed by counsel. In that case the plaintiff made out a prima facie case by proving an admission of the offense; then closed rely-

ing on the presumption of malice; and, after the defendant had undertaken to make out his justification, plaintiff introduced, under a claim of rebuttal, the eye-witness to the conflict, whom he should have introduced in chief. There was full proof of all the incidents of the conflict. Under the special tactics pursued at the trial, and because all the facts of the shooting were "fully disclosed," this court held that there was no room for any presumption. The case at bar does not occupy that attitude. There was no evidence from either side as to the circumstances of the battery, and the person assaulted was dead.

It is claimed further that the death of the party assailed terminates the right to recover punitive damages from the assailant. We do not accede to that view. It is true that section 1917 of the Code of 1892 provides that, where a trespasser shall have died, punitive damages may not be recovered from his estate; and in *Hewlett v. George*, 68 Miss. 703, 9 South. 885, this statute was applied, the court saying that punishment "did not follow him into the grave." But neither that statute nor that decision has any application here. In this case section 1916 of the Code of 1892 controls. That section authorizes the personal representatives to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. It has relation to the right of a deceased plaintiff. The very fact that in section 1917 the legislature prohibited a recovery of punitive damages from the estate of a deceased trespasser, and no such provision appears in section 1916 as to the case of a deceased plaintiff, shows that the legislature intended a difference, the subject matter being clearly before the legislative mind. Moreover, the reason for the difference is perfectly manifest. Punitive damages are inflicted for the purpose of deterring a culprit in the future, and the imposition of them for such purpose is impossible in the case of a person deceased. But where the trespasser is still alive, as in the case at bar, there is no reason whatever why he should be exonerated because of the death of the one upon whom he has committed a trespass; for the punishment is imposed not to deter him from repeating his trespass as against the particular party assailed or injured, but to secure his general good behavior. We have held above that this case is a proper one for the imposition of punitive damages. We are not prepared to say that, considering the evidence adduced in regard to the financial condition

of the defendant, and the fact that his assault, unexcused, was committed upon a minister of the gospel, the amount awarded was excessive.

Let the judgment be affirmed.

Exemplary Damages are recoverable, according to the weight of authority, although the defendant may be or has been punished in a criminal proceeding for the wrong: See the monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 882.

Records of the Conviction or Acquittal of a party, in a criminal prosecution, have been held not evidence of the facts on which they are based, in a civil action: Note to *Steel v. Cazeaux*, 13 Am. Dec. 291; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98. But see *State v. Adams*, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937, and cases cited in the cross-reference note thereto: *State v. Meek*, 112 Iowa, 338, 84 Am. St. Rep. 342, 84 N. W. 3.

SEALS v. WILLIAMS.

[80 Miss. 234, 31 South. 707.]

FORCIBLE ENTRY.—One who enters upon the possession of another against his will is guilty of a forcible entry, if the statute of the state defines a forcible entry to be one made by force, intimidation, fraud, or stealth. (p. 602.)

POSSESSION, CONSTRUCTIVE.—Where one is in actual possession of part of the lands described in a deed, he will be deemed in legal possession of all. (p. 602.)

Action of unlawful entry and detainer brought by the appellant, Mrs. Seals, against Williams and others. She claimed under a sale for taxes. At a survey made for her it was ascertained that about three acres of the tract were in the possession of one Moreland. He offered to surrender possession, but arrangements were subsequently made under which he was to remain in possession and pay rent. After he held possession about eight months, one Aleorn having an agreement with the original owners to purchase all the property, had the land surveyed, and during the survey, or just previous to it, he was told of the claim of title by Mrs. Seals, but disregarded it by taking possession of the tract, except the part leased to Moreland, and put the other defendants in possession to hold for him. Thereupon this action was brought to recover all the tract not in Moreland's possession. In the justice's court plaintiff recovered judgment. The defendant appealed to the

circuit court, where the judgment was given in their favor, from which plaintiff appealed.

Moore & Clark, for the appellant.

Calvin Perkins, for the appellees.

238 **WHITFIELD, C. J.** The earlier English statutes, and the earlier English decisions upon them, and many decisions in the states of the United States, define the meaning of the word "forcible," in statutes of this kind, as importing the idea of taking possession of land with "a strong hand," with "a multitude of people," and with "threats of personal injury to the occupant" sought to be expelled. This is shown in the note to *Evill v. Conwell*, 18 Am. Dec. 145. And Mr. Freeman also shows, at pages 146 and 147, that the statutes of Mississippi, Dakota, and Iowa define a "forcible entry" as being "where the defendant has by force or intimidation or fraud or stealth entered upon the prior actual possession of another in real property." And on page 147 he states: "In Illinois this very comprehensive doctrine prevails: If one enters into the possessions of another against the will of him whose possession is invaded, however quietly he may do so, the entry is forcible, in legal contemplation: *Croff v. Ballinger*, 18 Ill. 200, 65 Am. Dec. 735; *Smith v. Hoag*, 45 Ill. 250." And Mr. Freeman then states that "the statutes of other states above set forth—that is, Mississippi, Dakota, and Kentucky—would seem to warrant the same construction" adopted in Illinois. We understand the doctrine of *Parker v. Eason*, 68 Miss. 290, 8 South. 844, to accord with the doctrine in Illinois. It is perfectly plain that the appellant was actually in possession of the three acres included within Mordland's fence. The rest of the land was wild woodland. These three acres were cultivable land. The doctrine is well settled that, where one is in actual possession under a deed, he will be deemed in legal possession of all the lands embraced within the calls of his deed: *Wilson v. Williams' Heirs*, 52 Miss. 487; *Louisville etc. Ry. Co. v. Buford*, 73 Miss. 491. ²³⁹ 19 South. 584. In 13 American and English Encyclopedia of Law, second edition, page 750, the possession necessary to maintain this action is thus stated: "When one is in the actual possession of a portion of a given tract of land, he will be held, in law, to be in possession of the remainder, if he holds under a deed . . . and there is no adverse possession." The case of *Hardisty v. Glenn*, 32 Ill. 62, is one just like this, and we specially refer to it. The doc-

trine in Illinois is the doctrine of *Parker v. Eason*, 68 Miss. 290, 8 South. 844. We think, within these principles as applied to the facts of this case, the appellant was entitled to recover.

Reversed and remanded.

An Entry by Stealth or Against the Will of the person in possession may, according to some authorities, amount to a forcible entry: See *Croff v. Ballinger*, 18 Ill. 200, 65 Am. Dec. 735; monographic note to *Evill v. Conwell*, 18 Am. Dec. 147. Other authorities hold there must be actual violence, or such demonstration of force as is calculated to intimidate or alarm, or as tends to involve a breach of the peace: *State v. Mills*, 104 N. C. 905, 17 Am. St. Rep. 706, 10 S. E. 676; *Lewis v. State*, 99 Ga. 692, 59 Am. St. Rep. 255, 26 S. E. 496. See, too, *State v. Hawkins*, 125 N. C. 690, 74 Am. St. Rep. 669, 34 S. E. 537; *State v. Lawson*, 123 N. C. 740, 68 Am. St. Rep. 844, 31 S. E. 667.

Possession of Part of a Tract under a deed gives constructive possession of the whole: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 702-704.

STUART v. ROBINSON.

[80 Miss. 290, 31 South. 903.]

WILLS.—A Legacy will be Satisfied out of Lands Specifically Devised if the will was made by the testator on his deathbed, knowing that he had no money or personal property out of which the legacy could be paid. (p. 605.)

Suit by Mrs. Robinson to subject lands described in a will to the payment of the legacy therein bequeathed to her. Two days before her death the testatrix made her will as follows:

“State of Mississippi, }
Lincoln County. }

“I, Mary Emily Stuart, of Lincoln county, Mississippi, of sound and disposing mind and memory, make this my last will. I will, devise, and bequeath all of my estate and property as follows: To my cousin, Mrs. Elizabeth Stuart Robinson, of Washington, D. C., daughter of my uncle, James Stuart (\$500) five hundred dollars in loving remembrance. To my niece, Mrs. Martha Stuart Cochran, of Waco, Texas, a tract of Robinson county, Texas, land, known as a part of the P. S. McNeill tract, consisting of eight hundred and forty acres.

“There are relics here belonging to the Cope family, which I will describe and trust to Mrs. Gussie Stuart to hand over to Mrs. Cochran. There is a small silver spoon, one hundred

years old, which came out of my grandfather Stuart's family, which is all I have of that table silver. There is one pin cushion, mounted in silver, dated 1784, formerly owned by Jennie Wilkins White, my grandmother; also one black Lama shawl, Lama lace, which belonged to Mrs. Criswell, which is to be given to Mrs. Cochran. I have a book written by college students, 'Addresses and Lectures to the Young,' which I gave to Mrs. Cochran. Should there be anything specially among the heirlooms that Mrs. Kate Cooney Abbott would specially like to have, I want her to have it.

"To my dear and beloved friend, Mrs. Mary Jane Grafton, widow of James Grafton, of Lincoln county, Mississippi, I leave to her the place known as the 'Abells place,' situated near Montgomery, in Lincoln county, Mississippi, in loving remembrance. I hereby appoint Mack Stuart, of Beauregard, Mississippi, my beloved cousin, as executor of my estate without bond.

"To my beloved cousin, George Robert Stuart, my entire property situated in the town of Brookhaven, Lincoln county, Mississippi. In the event of his death the property is to be given to my beloved cousin, Jennie Vee Stuart. In case both should die, the property is to belong to Mack Stuart or his heirs. To Mrs. W. S. Bowen I leave my iron bedstead and the furniture in the room. To Mrs. East, wife of the Reverend Mr. East, who so kindly nursed me, I leave my piano. To Mrs. R. C. Boone, my beloved friend, I leave the amount of fifty dollars to be paid at the convenience of the executor.

"I also request my executor to settle bills of Thomas Perkins, amounting to fourteen dollars and some cents; also my drug bill at Grafton's Drug Store; also Doctor Johnson's bill for services rendered me in professional capacity.

"The said executor, Mack Stuart, shall at my death proceed to wind up the affairs of the estate as the will directs. [Fifty dollars to Mrs. East instead of the piano, and piano to Ida Keenan.]

"In witness whereof, I have signed, published, and declared this instrument as my will, at Brookhaven, Lincoln county, Mississippi, this the 3d day of May, A. D. 1899.

"MARY EMILY STUART.

"Witnesses: Mrs. BEILLE LARKIN.

"Mrs. JANE KEENAN."

The defendants demurred to the bill, and their demurrer having been overruled, they appealed.

A. C. McNair and McWillie & Thompson, for the appellants.

P. Z. Jones, for the appellee.

²⁹⁷ CALHOON, J. From the will in this record, which the reporter will publish in full, considered in the light of the surroundings of the testatrix at the time she made it, we conclude that her intent was that the money legacies were to be satisfied out of the lands specifically devised. This is not a case where a testator left money or personalty sufficient to satisfy pecuniary bequests. Miss Stuart had neither, and knew she had neither, and it cannot be supposed that, on her deathbed, only two days before she ceased to breathe, she had the purpose to perpetrate a ghastly joke: *Clotilde v. Lutz*, 157 Mo. 439, 57 S. W. 1018; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601.

Affirmed.

The Payment of Pecuniary Legacies is usually not chargeable to real estate, unless the intention of the testator so to charge them is expressly declared, or may fairly be deduced from the language of the will. But, where the testator, by his will, executed the day before his death, gave a legacy to his wife, and another to his son, and devised the rest of his estate to his four children, and his personal estate proved insufficient to pay his funeral expenses, it was held that it must be considered that he intended to charge the real estate with the legacies: See the monographic note to *Brill v. Wright*, 8 Am. St. Rep. 722, 723.

HERRIN, LAMBERT & CO. v. DALY.

[80 Miss. 340, 31 South. 790.]

EVIDENCE. IMMATERIAL—Reversal for Admission of.—In an action to recover for personal injuries claimed to be due to the negligence of the defendant, it is error, entitling him to reversal, to admit, against his objection, testimony showing that in case of a recovery, he is indemnified from loss by a policy in a casualty insurance company. (p. 606.)

PRACTICE—Objection to Evidence—When not Waived.—If testimony is objected to on the ground that it is immaterial and incompetent, and because the writing called for by the question is not produced, and the objection is overruled, it is not waived because the adverse party then produces the writing and reads it in evidence, without the objection being then renewed. (p. 606.)

Action by Daly against the Herrin-Lambert Company. Judgment for the plaintiff and defendants appealed.

Bowers, Chaffe & McDonald, for the appellant.

Shannon & Street and Woods, Fewell & Fewell, for the appellee.

³⁴¹ CALHOON, J. The declaration is for damages for a serious hurt to appellee, an employé at a sawmill owned by appellants, who were not a ³⁴² corporation, but a private partnership. Of course the fellow-servant rule applies in full force, and recovery could be had only if the injury was caused by the negligence of the master, or his negligence co-operating with that of a fellow-servant. On the cross-examination by appellee's counsel of Lambert, one of the defendants below, as a witness, he was asked if there was any one back of his firm who would satisfy the judgment if obtained. The court overruled an objection to this, and we think this action error. It could not conceivably throw any light on the issue, and could have no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected. The error was not cured, because, the objection having been put on the basis of irrelevancy and incompetency, and also for the further reason that the accident indemnity policy was in writing not produced, the writing was then read in evidence by plaintiff without renewed objection. The principle was decided against defendants, and exception taken, and they were not required by law to repeat their objection. The conflict of testimony as to liability for this unfortunate injury makes too close a case to admit of affirmance regardless of this error. In order to exclude a conclusion, it is proper to say that we do not pass on the instructions to the jury, given and refused.

Reversed and remanded.

An Insurance Indemnifying one for his liability to persons who may be injured through his negligence is not, on the occurrence of such an injury, impressed with a trust in favor of the person injured. The insurer is, therefore, at liberty to settle with and pay the insured such sum as they may, in good faith, agree upon; and such payment being made, the person injured has no recourse against the insurer: *Bain v. Atkins*, 181 Mass. 240, ante, p. 411, 63 N. E. 414.

SWEAT-BOX CASE.

[80 Miss. 592, 32 South. 9.]

EVIDENCE—Confessions of the Accused Made After Several Days' Confinement in a Sweat-box, excluded from light or air, are not admissible in evidence against him. (p. 608.)

Prosecution and conviction for burglary. Certain confessions made by the accused as decided by the opinion of the court were received in evidence against and notwithstanding his objection, and he appealed, assigning the overruling of his objection as error.

D. Marshall and Theodore G. Burchett, Jr., for the appellant.

594 CALHOON, J. The chief of police testified that the accused made to him a "free and voluntary" statement. The circumstances under which he made it were these: There was what was known as a "sweat-box" in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had him put there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat-box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after "several days" of obstinate denial, accomplished **595** the purpose of eliciting a "free and voluntary" confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession—no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to do what was right," and that it "would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of

these sweat-box patients, since this officer says: "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient, Ammons: "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat-box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth—that is, confess guilt of the crime—they are let out of the sweat-box. Speaking of this apartment, and the habit as to prisoners generally, this officer says: "We put them in there [the sweat-box] when they don't tell me what I think they ought to." This is refreshing. The confession was not competent to be received as evidence: 6 Am. & Eng. Ency. of Law, p. 531, note 3; 6 Am. & Eng. Ency. of Law, p. 550, note 7; *Hamilton v. State*, 77 Miss. 675, 27 South. 606; *Simon v. State*, 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from this "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial.

Reversed and remanded.

Confessions as Evidence are considered in the monographic notes to *Daniels v. State*, 6 Am. St. Rep. 242-251; *State v. Clifford*, 41 Am. St. Rep. 522-524; *Nolen v. State*, 46 Am. Rep. 253-260; *Heldt v. State*, 57 Am. Rep. 839-842. To be admissible, they must be voluntary: *Bullock v. State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *State v. Storms*, 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610.

HOWELL v. SHANNON.

[80 Miss. 598, 31 South. 965.]

TAX TITLE—Purchase of Lands Belonging Partly to the Purchaser.—If a tract of land, consisting of several subdivisions, is owned in severalty by two persons, but assessed to unknown owners, and a single tract is sold in solido at a tax sale to one of them, such sale is void. (p. 610.)

DAMAGES, Punitive.—If one claiming lands under a tax title enters thereon and commits such acts of trespass as evince a determination to enforce his claim, whether good or bad, at any hazard, punitive damages may properly be awarded against him. (p. 611.)

Mayes & Harris, for the appellant.

Green & Green, for the appellee.

605 **TERRAL, J.** The matters of controversy in this suit were determined in the chancery court of Jackson county. The bill of complaint was filed by S. H. Shannon against William Howell, in which Shannon claimed to be the owner of all of section 34, township 5 S., range 6 W., in Jackson county, lying north of a line commencing 24 chains and 38 links north of the southeast corner of said section, and running thence west 40 chains to Kirkwood lake, thence following the center of said lake in a southerly course until it crosses the west line of said section 34, and seeking to cancel, as a cloud upon his title thereto, a tax title **606** held by William Howell. The bill further alleged that Shannon, in March, 1901, sometime before and since said time, was operating a turpentine orchard upon said land as a means of livelihood and source of profit, having as many as 7,000 boxes thereon, and that Howell, in willful disregard of the right and possession of said Shannon, entered upon said land and cut and removed therefrom 57 trees, for which he demanded the statutory penalty of \$15 per tree. Said bill of complaint further alleged that said William Howell had willfully, without cause or excuse, caused some of his turpentine boxes to be filled with dirt, others to be set on fire and burned, drove nails in the trees where the next streak should have been made, and thereby caused the hacks used by his workmen in chipping said trees to be broken, and had willfully interfered with his hands in the operation of said turpentine orchard, and had intimidated them from working therein by threats of prosecuting them for trespass; and by these means had greatly damaged his business, as he alleged, in the additional sum of \$700;

for all which sums he demanded a personal recovery. The defendant, William Howell, made his answer a cross-bill, and, claiming title to the land in controversy to be in him, he alleged that Shannon had willfully trespassed upon it, had cut turpentine boxes into a great many of his trees, to his great injury and damage, for which he demanded punitive damages in the sum of \$1,250. The chancellor canceled Howell's tax title, and gave a decree for complainant for \$855 punitive damages for cutting and removing the 57 trees, and \$250 punitive damages for the other trespasses above recited, less the taxes paid by Howell on Shannon's part of said land, aggregating \$1,095.94; and from that decree Howell appeals.

But two questions arise upon the record: 1. The validity of the tax title of William Howell; 2. The imposition upon Howell of punitive damages. According to the record the assessment of section 34, township 5 S., range 6 W., at the time of the sale, stood as follows: "A. A. Vaughn, 20 a. in S. E. ⁶⁰⁷ quarter of Allen Goodwin claim, 34, 5, 6; William Howell 34 a. in S. E. quarter of Allen Goodwin claim, 34, 5, 6; unknown all except Allen Goodwin claim 580, a. 34, 5, 6." In fact, in 1896, when the assessment of this land was made, Daniel McInnis, of whom Shannon subsequently purchased, owned all of section 34 lying north of the line described in the beginning of this opinion, being about 480 acres, and William Howell owned all of the S. W. quarter of said section 34 south of said line and 34 acres in the S. E. quarter of said section 34 immediately south of and next to said divisional line above described, being about 100 acres. Howell and McInnis each made attempt to pay the taxes upon his respective portion of said land, with the result, however, that McInnis failed to pay the taxes on any portion of his land in said section, and Howell paid only on his land in the southeast quarter of said section. In March, 1899, the land in controversy, assessed as above stated, was sold to said William Howell for \$10. We have, therefore, a case where a tract of land, 580 acres in quantity, containing several legal subdivisions, owned in severalty by two persons, but assessed to unknown owner as a single and entire tract, is sold in solido at a tax sale and purchased by one of said owners, who claims the fee in the entire tract by reason of said purchase. We think the tax sale void. It is the duty of every owner of land to list it by description and value to the assessor for assessment, and if either of the owners in this instance had listed this parcel of land as being owned by him, and had suf-

ferred it to be sold at tax sale, and had bought it in, he would not have acquired a title by such purchase: *Ragsdale v. Alabama etc. R. R. Co.*, 67 Miss. 106, 6 South. 630. And where the owner fails to render his assessment, the assessor performs that office for him, and the assessment by the assessor stands upon the same footing as that made by the owner; and where the land is assessed as an entirety at one lump sum, the tax cannot be apportioned to the several parcels; nor can an owner of a part of the land so ⁶⁰⁸ assessed take a benefit or advantage under a purchase at tax sale that he could not take if it had been listed by himself for taxation. It was plainly the duty of the tax collector to offer for sale forty acres of said section 34, and to have added a similar subdivision, etc., until the necessary tax was produced; and whether the first, second, third parcel, or the whole tract, be sold, the owner of a part of said land cannot make a valid purchase of it, because a part of the tax of the whole tract, and of each and every parcel of it, is legally due from him, and in making the attempted purchase he is but paying his own debt. It is by his neglect of duty that his land is assessed with the land of another person as an entirety, and he cannot gain an advantage at a sale thereof under such circumstances. The relation of Howell to the assessment did not permit him to acquire a title to McInnis' part of the land, but at most gave him a right to subject the land of McInnis to the payment of its proportionate part of the taxes assessed to the whole tract: *House v. Gumble*, 78 Miss. 259; 29 South. 71; *Cone v. Wood*, 108 Iowa, 260, 75 Am. St. Rep. 223, 79 N. W. 86; *Black on Tax Titles*, see. 261.

2. The question of good faith of Howell, or of willful wrong by him in trespassing upon the lands of Shannon was fairly submitted to the chancellor, and his finding is supported by evidence of such determined purpose on the part of Howell to enforce his claim, whether good or bad, and at any hazard, that no other finding could have been expected or justified.

Affirmed.

Tax Sales.—If land owned by two persons in severalty is taxed as one parcel, a mortgagee of one owner cannot purchase the entire tract at a tax sale, and acquire title, so as to divest the title of the other owner: *Cone v. Wood*, 108 Iowa, 260, 79 N. W. 86, 75 Am. St. Rep. 223, and see the extended note thereto on who may purchase and enforce a tax title.

ILLINOIS CENTRAL RAILROAD CO. v. HOSKINS.

[80 Miss. 730, 32 South. 150.]

FIXTURES.—Where the Superstructure of a Railroad is placed on the land of another, the railroad company cannot be said to have intended to attach the railway ties, and other appliances, to the freehold, so as to make them a part thereof. (p. 613.)

A RAILWAY Placing Its Tracks on Lands of Another, but having good reason to think it had acquired a right of way, though responsible as a trespasser, is not liable to punitive damages, nor does the right to the material of which the road is constructed vest in the owner of the land. (p. 613.)

EJECTMENT Against a Railway to Recover Land on Which Its Track was Placed, Without First Acquiring a Right of Way, may be maintained by the land owner, who may also recover for the use and occupation of the land, and all damages done in constructing the roadbed for the track, but his compensation cannot be increased by reason of the use of the track as part of its system of railways. This rule applies to a part of a short spur line as well as to the main line. (p. 615.)

Mayes & Harris and J. M. Dickinson, for the appellant.

Harper & Potter, for the appellee.

737 TERRAL, J. Samuel W. Hoskins brought an action of ejectment in the circuit court of Lincoln county against the Illinois Central Railroad Company for the N. half of the S. W. quarter of section 6, township 7 N., range 9 E. Two thousand five hundred dollars was demanded for the use and occupation of it by defendant. The defendant pleaded the general issue, and gave notice of valuable improvements put upon the land by it to the amount of \$100,000. These improvements constitute the roadbed and track of about 1,000 feet across said land, being a part of its spur line from Brookhaven to a gravel pit beyond the same. The plaintiff had a recovery for his land, and also for \$1,800 for the use and occupation of it for six years, with an allowance of \$300 to defendant for its improvements. From a judgment entered in conformity with this verdict the Illinois Central Railroad Company appeals. The \$1,800 allowed for rent to plaintiff arose, as it is claimed, by reason of the freights which the company should have received from hauling gravel and lumber taken at the east end of the spur road over the spur line and over its main line, whithersoever carried; one-third of which freights, it is asserted, should be paid to plaintiff, and which third was estimated, or rather guessed, to be \$1,800. The \$300 allowed to defendant for valuable improvements is the outcome of this

1,000 feet of railroad on plaintiff's land, which the evidence of a witness for the plaintiff showed it must have cost the defendant \$2,000 to construct, while that of a witness for the defendant showed its building to have cost more than \$3,400. This statement, considered in connection with the verdict, demonstrates, we think, the impropriety of the result here reached. The plaintiff should not have recovered \$1,800 for the use and occupation, because no part of that sum arose from any use of the land to which the defendant could have devoted it, nor should the defendant have been allowed \$300 for the value of the structures put by it upon the land, which structures it is entitled ⁷³⁸ to remove at its pleasure. It is a general rule of law that whatsoever chattels are attached to the realty with the manifest intent that they remain there becomes part and parcel of it, and cannot be removed without the consent of the owner of the freehold to whom they are considered a gift; but to this rule there are exceptions, and among others is the superstructure of a railway company. Such a company exercises the right of eminent domain—a governmental function—and takes no freehold, but a mere easement, and therefore cannot be said to have intended to attach its rails and ties and other appliances to the freehold. They are constructed also for public use and enjoyment, and it is their quality in this respect that distinguishes the acts of the company in their construction from those of a trespasser or others; and, if the terms for acquiring this easement are too onerous, it may remove its rails and ties, and pass in another direction. True, if it does not proceed in conformity with its power in the condemnation of the land for its right of way, and until it does so proceed, all its acts upon the land are trespasses, for which it is liable; and it may be put out of possession by ejectment. The defendant here had good reason to think it had acquired a right of way over this tract of land, and it therefore is not liable for punitive damages; but for all its acts upon the land, unless and until it acquires a right of way, it is responsible as a trespasser. This court, in *Louisville etc. R. R. Co. v. Dickson*, 63 Miss. 380, 385, 56 Am. Rep. 809, approved the doctrine announced on this subject by the courts of Pennsylvania, Michigan, and Alabama. In *Justice v. Nesquehoning etc. R. R. Co.*, 87 Pa. St. 28, it is said: "The common-law rule is undoubted that a trespasser who builds on another's land dedicates his structures to the owner. This case is not the case of a mere trespass by one having no authority to enter but of one repre-

senting the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use—materials essential to the very purpose which the state has declared in the 739 grant of the charter. It is true, the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to the taking of the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures *volens volens*, but not in this case: for, though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land; and consequently to reclaim and avail itself of the structures laid thereon. Another evident difference between a mere tortfeasor and a railroad company is this: The former necessarily attaches his structures to the freehold, for he has no less estate himself; but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases, the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit: The right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purposes; and, lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law, notwithstanding the original illegality of the entry. There are some analogies bearing remotely on the question before us, showing that property is not gained by the owner of 740 the land because found upon it." etc. In *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271, the supreme court (47 Mich. 465, 11 N. W. 273), said: "We are of opinion that no error was committed in excluding from the compensation

allowed to Dunlap the value of the railroad track laid upon the land. The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold." In *Jones v. New Orleans etc. R. R. Co.*, 70 Ala. 227, Brickell, C. J. ably demonstrates that the necessary structures for a railroad, placed upon land by one having the power of eminent domain, continue, under all circumstances, the personal chattels of such one. This rule is announced in *Illinois Cent. R. R. Co. v. Le Blanc*, 74 Miss. 650, 673, 21 South. 760, where many of the authorities supporting it are cited with approval. The plaintiff shows a right to recover the premises from the defendant, and he is entitled to recover also of defendant, for its use and occupation, a reasonable compensation for any use to which it could reasonably have been put by the plaintiff, and a further sum to cover all damages done upon the land by the defendant in constructing a roadbed for its railway track. The plaintiff is to be compensated for all losses, but he should have no increased compensation by reason of its use as a part of the system of railroad operated by defendant: *Sullivan v. Lafayette County*, 61 Miss. 271; *Kille v. Ege*, 82 Pa. St. 102; *Bullock v. Wilson*, 3 Port. (Ala.) 382; *Sedgwick on Damages*, sec. 908. The appellee insists that these principles do not apply to this case because the 1,000 feet of roadbed here sued for is only a part of a short spur line, and not an essential or necessary part of defendant's main line; but the principle of law relating to the subject applies alike, we think, to both cases.

Reversed and remanded.

Where Land is Taken for a Right of Way by a railway without compensation and improvements are made thereon, the owner acquiescing, he is estopped to maintain ejectment if compensation is offered him, but he is not estopped to demand compensation: *Southern Ry. Co. v. Hood*, 126 Ala. 312, 85 Am. St. Rep. 32, 28 South. 662; *Hendrix v. Southern Ry. Co.*, 130 Ala. 205, 89 Am. St. Rep. 27, 30 South. 596; *Florida etc. R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566; *Charleston etc. Ry. Co. v. Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17, 30 S. E. 972. For authorities holding that the land owner may maintain ejectment, see *Daniels v. Chicago etc. R. R. Co.*, 35 Iowa, 129, 14 Am. Rep. 490; *Terre Haute etc. R. R. Co. v. Rodell*, 89 Ind. 128, 46 Am. Rep. 164.

SHIPP v. McKEE.

[80 Miss. 741, 32 South. 281.]

INFANT'S RIGHT to Disaffirm a Conveyance—Within What Time may be Exercised.—An infant who makes a conveyance has until such time as will complete the bar of the statute of limitations, after the removal of his disability, to disaffirm his deed, and his silent acquiescence will not be regarded as a confirmation of the sale, unless prolonged for the period required to make the statute of limitations a bar, or under circumstances requiring him to decide and act as to confirmation or disaffirmance. (p. 616.)

AN INFANT REMAINDERMAN Conveying his Interest in Real Property is not Required to Disaffirm his conveyance during the continuance of the life estate, though in the meantime he has become an adult, but may disaffirm, after the expiration of such estate, at any time before the right to maintain an action to recover the property has been barred by the statute of limitations. (p. 617.)

INFANTS.—The Right to Disaffirmance of a Conveyance Made by One When an Infant is not Lost by Mere Inertness or Silence continuing for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to consent to the conveyance. (p. 619.)

George F. Maynard and Henry T. Helm, for the appellant.

Frank Johnston and D. A. Scott, for the appellees.

745 TERRAL, J. By the last will and testament of Cynthia R. Shipp, she devised the lands in controversy to John W. Shipp for his life, and the remainder in fee to Mary B. Shipp and others; one-sixth interest therein being devised to Mary B. Shipp. John W. Shipp, the life tenant, deceased on the eighteenth day of September, 1899; and soon thereafter Mary B. Shipp brought her bill for partition against Mrs. Margaret B. McKee, her cotenant, and McGrath, who claimed a lien upon said land under **746** a trust deed thereon made by Mrs. McKee. In 1885, while Mary B. Shipp was a minor about eighteen years of age, she executed, jointly with John W. Shipp, the life tenant, and with cotenants in remainder, a conveyance of said properties (being about thirteen hundred and thirty-six acres of land) to Toof, McGowan & Co., under whom Mrs. Margaret B. McKee claims title. This bill is by Miss Shipp to have her one-sixth interest in said property allotted to her, and for the recovery of her share of the profits of said property since the 18th of September, 1899. Her bill being dismissed, she appealed.

It is said that appellant is barred of any remedy because she could and should, upon coming to the age of twenty-one years, have filed her bill to remove the cloud from her title created by the execution of the deed made by her while under said

age. Under the authority of *Fox v. Coon*, 64 Miss. 465, 1 South. 629, such suit would lie, yet the appellant is in no legal default by failing to bring such suit. In *Wallace v. Latham*, 52 Miss. 297, it is said: "It is well settled that the infant who makes a deed conveying realty during infancy has until such time as will complete the bar of the statute of limitation, after the removal of disability, to disaffirm the deed, and that bare recognition or silent acquiescence will not be regarded as confirmation of the sale, unless prolonged for the period required to make the statute of limitations a bar, or under circumstances requiring the party to decide and act as to confirmation or disaffirmance." In *French v. McAndrew*, 61 Miss. 192, it is said: "The effect of the disaffirmance by her [a minor] is to render the conveyance void ab initio by relation, and to entitle her to charge the purchaser for rents during the whole time that he occupied the property, claiming under her deeds. But the defendant by the conveyance acquired the title of Mrs. Hubbard, who was a cotenant of complainant, and thus became cotenant with her, and his liabilities and rights are therefore to be tested by the rules governing cotenants." And so in the case here Mrs. Margaret B. McKee has acquired the rights of the other ⁷⁴⁷ cotenants in remainder with Mary B. Shipp, and is a cotenant with her in said property; Mary B. Shipp being entitled to a one-sixth interest in said lands and Mrs. McKee to the other five-sixths interest therein. In *Hoskins v. Ames*, 78 Miss. 986, 29 South. 828, where the appellants were remaindermen under the will of Edmund Hatch, and the life tenant, under a decree of the vice-chancery court, had conveyed the property in fee to Welborn, under whom appellees there claimed, the appellants were held not barred of remedy, although the appellees had been in possession more than forty years, and the appellants had reached majority, and had suffered more than thirty years to pass without making complaint. It was held that the remaindermen were not required to make any move until their right of possession came into existence. Under our statute, a tenant in remainder cannot bring suit for partition, nor would ejectment lie until his right of possession accrued.

Reversed and remanded.

Counsel for appellees filed a suggestion of error, to which response was made as follows by

WHITEFIELD, C. J. Owing to the great regard we have for any views seriously urged by the learned counsel for appellee, we will make response to the suggestion of error filed in this case. The distinction between disaffirming a contract by a minor and bringing an action at law by a remainderman during the existence of a life estate is, of course, clear; but learned counsel is mistaken in asserting that the American doctrine is that the minor must, in all cases, disaffirm the executed contract in a reasonable time after reaching majority, though that reasonable time be short of the period which would bar the action under the 748 statute of limitations. He relies chiefly on the case of *Long v. Williams*, 74 Ind. 119, but that case merely reannounces the doctrine of *Law v. Long*, 41 Ind. 586, and *Scranton v. Stewart*, 52 Ind. 68, and all three of these cases are impliedly, if not expressly, overruled by *Sims v. Bardoner*, 86 Ind. 94, 44 Am. Rep. 263; and they are also clearly in conflict with the doctrine announced by the supreme court of the United States in *Sims v. Everhart*, 102 U. S. 300. All this will clearly appear if learned counsel will carefully examine the note to *Sims v. Bardoner*, re-reported in 44 Am. Rep. 273. In that note the learned editor says at page 273: "It is true that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant, to avoid it, must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance, and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the statute of limitations, and that silent acquiescence for any period less than the period of limitation is not a bar. Such was, in effect, the ruling in *Irvine v. Irvine*, 9 Wall. 627. See, also, *Prout v. Wiley*, 23 Mich. 164, a well-considered case, and *Drake's Lessee v. Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But these cases either rely upon *Holmes v. Blogg*, 8 Taunt. 508 (which was not a case of an infant's deed), or subsequent cases decided on its authority, or they are rested in part upon other circumstances than mere silent acquiescence, such as standing by without speaking

while the grantee has made valuable improvements, or making use of the consideration for the deed. The preponderance of authority is that in deeds executed by infants mere inertness or silence, continued for a period less ⁷⁴⁹ than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed; and those confirmatory acts must be voluntary." It thus is clearly shown that the true doctrine is, and that the preponderance of authority is, that in deeds executed by infants mere silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by conduct that would estop, will not bar an infant's right to avoid the deed. It may be true that a majority of cases carelessly state the case as counsel puts it; but, as shown in the quotation above, these cases relied upon *Holmes v. Blogg*—a wholly false basis, since it was not the case of an infant's deed at all—or depend upon conduct upon the part of the infant which would work an estoppel on him. In this case there is no evidence whatever to show anything on the part of this minor beyond mere silence. She was almost the whole of the time out of the state, having done nothing affirmatively, having not bound herself by any positive conduct which would work an estoppel. She had the full time fixed by the statute of limitations after majority within which to disaffirm. This is well settled in our state by *Wallace v. Latham*, 52 Miss. 291; *Brantly v. Wolf*, 60 Miss. 420; *Allen v. Poole*, 54 Miss. 323.

Learned counsel is also mistaken in saying that there is no evidence showing that Busby was trustee. The recitals in the instruments of record show this with sufficient clearness and distinctness.

Overruled.

An Infant's Right to Disaffirm his deed must be exercised within a reasonable time after he becomes of age: *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372. As to what is a reasonable time depends largely upon the circumstances of each particular case, and, at all events, should not exceed the period prescribed by the statute of limitations within which an action may be brought to recover the land, but many authorities allow that length of time: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 671-677. Respecting an infant's right of disaffirmance in general, see *United States Investment Co. v. Ulrickson*, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326, and cases cited in the cross-reference note thereto.

LUM v. FAUNTLEROY.

[80 Miss. 757, 32 South. 290.]

JUDGMENT in Another State—Right to Impeach Consideration of.—A contract deemed by our civil and criminal laws immoral, and which the courts of this state are prohibited from enforcing, is not sanctified and purged of its illegality by a judgment rendered thereon in another state against a citizen of this state sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause cannot be inquired into. (p. 620.)

Action by Fauntleroy against Lum on a judgment recovered against him in Missouri. The debt out of which such judgment grew was a gambling contract. The controversy was submitted to arbitration. The suit in Missouri was based on an award of the arbitrators, and the court of that state refused to go behind the award and rendered judgment against the defendant. He in this action pleaded against the judgment the immoral contract on which it was based, but the trial court disregarding the plea, gave judgment for the plaintiff, from which the defendant appealed.

Catchings & Catchings, for the appellant.

McLaurin, Armistead & Brien, for the appellee.

763 TERRAL, J. Until the supreme court of the United States shall expressly so declare we will not hold that a contract condemned by our civil and criminal laws as immoral, and which the courts of this state are prohibited from enforcing, is sanctified and purged of its legality by a judgment rendered in another state against a citizen of this state, sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause of action may not be inquired into. There are decisions of the supreme court which seem to hold that it is not allowable to go behind the judgment for the purpose of examining into the validity of the claim, but we are unwilling to believe that it will ever be held that a court is precluded by the constitution of the United States from ascertaining whether the claim on which a judgment is rendered in another state is such a one as the courts of the state in which suit on the judgment is brought, on grounds of public policy, are expressly prohibited from enforcing. If this be law, all that is necessary to free the most corrupt transaction from all objection is to obtain service on a party and get judgment in another state, and then come into a court of this

state and obtain judgment, by virtue of article 4, section 1, constitution of the United States and the act of 76th Congress in pursuance of it. It is true the suit in Missouri was on an award of arbitrators, but the matter submitted as averred by the plea was a claim based on a gambling contract in "futures," and the illegality of the transaction was not involved in the submission, and, therefore, was not, if it could be, concluded by the award. The second replication to the plea of defendant does not controvert the allegation of the plea as to its averment that the illegality of the transaction was not involved in the arbitration, and we interpret this replication as merely intended to invoke the constitution of the United States as precluding inquiry into the nature of the cause of action on which judgment was rendered. This question had been raised by the demurrer to the plea, which the court overruled, and the second replication was no more than calling in question at a later stage of the case the correctness of the former ruling. We approve the former ruling, believing that the plea presents a bar to the action.

Reversed and remanded.

Foreign Judgment.—The validity of the contract upon which a judgment is rendered in a sister state is established by such judgment, so it is held, in *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225, and cannot afterward be questioned.

LEARNED v. OGDEN.

[80 Miss. 769, 32 South. 278.]

WASTE.—A Cutting Down of Trees by a Life Tenant for Mere Profit is waste. (p. 623.)

WASTE.—A Tenant by the Curtesy by cutting down trees for sale commits waste. (p. 623.)

WASTE.—Actions by Reversioners for.—The felling of trees by a tenant for life, or years, for the purpose of selling them, is an injury to the inheritance, for which the reversioners have their appropriate action. (p. 623.)

WASTE.—Extent of Reversioner's Right to Recover for.—Trees when felled or separated from the soil, and cut for profit, become personal property, in which the tenant in possession has no interest, and the reversioner may maintain his action for the possession of the property, or for damages in the same manner, and with like effect, as if he were the owner of the estate in possession. (p. 623.)

REVERSIONER—Life Tenant Cannot Bind.—A tenant by the curtesy in possession has no authority to represent the reversioner, or to bind him in any manner whatever. A sale of trees made by such tenant is, therefore, void. (p. 623.)

STATUTE OF LIMITATIONS Against One of the Several Plaintiffs.—Where the action is joint, there can be no recovery of any part of a cause of action which is barred by the statute of limitations against any of the plaintiffs. (p. 623.)

EVIDENCE—Erroneous Admission of—When not Cured by Instructions.—Though there is an instruction confining plaintiff's right to recover to certain wrongs done to him, yet if the court has admitted evidence of other wrongs and trespasses which the jury appear to have considered, the judgment must be reversed. (p. 624.)

EVIDENCE.—Sawmill Books of the defendant furnish no evidence to determine his liability in an action of waste for cutting timber. (p. 624.)

EVIDENCE—When Insufficient.—To Sustain a Recovery by the Plaintiff in an Action for Waste, the evidence should show, with reasonable certainty, what trees were severed by the defendant or his servants, or that injury was done by him or them to the plaintiff's inheritance during the period for which the bar of the statute of limitations does not apply. (p. 624.)

REVERSIONERS and Life Tenants.—The fact that a life tenant should have protected the inheritance from injury, and might have sued for injury done, cannot impair the rights of action of the reversioners. (p. 625.)

INFANTS—Statute of Limitations Against is not Brought into Action by the Neglect of Their Guardian.—The fact that the life tenant became the guardian of minor reversioners could not put the statute of limitations into operation, so as to affect their right of action for waste. It is only when the legal title to property is in a guardian that the statute of limitations begins to run. (p. 625.)

Ernest E. Brown and Green & Green, for the appellant.

Smith, Hirsh & Landau and Pintard & Ratcliff, for the appellees.

778 **TERRAL, J.** In 1878 Elizabeth Ogden departed this life intestate, seised of Black Creek plantation, containing more than 2,200 acres of land, lying north of Coles creek, and near the Mississippi river, in Jefferson county. She left surviving her husband, W. F. Ogden, Sr., who was entitled to a life estate in said lands as tenant by the curtesy, and who died in 1899, and six children, entitled to said estate in reversion. Two of said children died in infancy, leaving the four others to inherit their interest in said lands. The four children of Mrs. Elizabeth Ogden, in June, 1900, brought suit against appellant, Learned, for trespass on the said Black Creek plantation in cutting, felling, removing, and destroying between January 1, 1879, and the commencement of this suit

30,000 cypress trees standing and growing upon said land, of the value of \$2.50 per ⁷⁷⁹ tree, aggregating \$75,000, to the great injury of their inheritance. They recovered a verdict of \$68,267.92. Upon a motion by appellant for a new trial the court required appellees to remit one-half the amount of said verdict, and thereupon entered a judgment against appellant for \$34,133.96, and from that judgment Learned appeals.

As a new trial must be granted, it will be unnecessary to notice in detail the pleadings or the evidence. While the law of waste, as established in England, is modified by its transplantation to this country to suit the conditions of a new and uncleared country, and to allow a tenant for life to open wild lands for necessary cultivation or to change the course of agriculture without being liable for waste, yet the cutting down of trees for his mere profit is here, as there, considered waste. A tenant by the curtesy, as an incident in his estate, may take reasonable estovers of all kinds, and he may cut timber to pay taxes, or to improve the land, and when so cut it belongs to the tenant, and not to the reversioner. But the cutting down by the tenant of trees for sale is waste, and the felling of trees by the tenant or others for a sale of them is an injury to the inheritance, for which the reversioners have their appropriate action. Trees, when felled, or severed from the soil, become personal property, in which the tenant in possession has no interest when cut for profit; and the reversioner may maintain his action for the possession of the property, or for damages therefor, in the same manner and with like effect as if he were the owner of the estate in possession. A tenant by the curtesy in possession has no authority, as such, to represent the reversioner, or to bind him or his estate in any manner whatever: Notes to Allen v. DeGroodt, 14 Am. St. Rep. 628 et seq.; notes to Miles v. Miles, 64 Am. Dec. 367 et seq.; 4 Kent's Commentaries, 74 et seq. From these views of the subject it results that the sale of the cypress trees growing on Black Creek plantation by W. F. Ogden, Sr., the life ⁷⁸⁰ tenant, to the defendant Learned, of date February 8, 1881 was in every respect void and of no force whatever.

As the action of the plaintiffs below is a joint action, we think the court correctly ruled that the plaintiffs were entitled to recover only for the injury to their inheritance inflicted upon it by the defendant prior to the eighteenth day of January, 1888, when the eldest of the plaintiffs became twenty-one years old, because it is perfectly manifest that for all injuries done

to the inheritance since the eighteenth day of January, 1888, the plaintiffs are barred of all recovery by the statute of limitations relating to actions. A consideration of the record discloses the fact that the evidence of the felling of trees upon Black Creek plantation was not confined to proof of the injuries inflicted by Learned between February 18, 1881—when it may be assumed, if specific proof justified it, that Learned commenced cutting timber upon the said lands—and January 18, 1888, as to all trespasses after which time plaintiffs were barred of remedy against him; but said evidence extended to any and all injuries done by any and all persons prior to February, 1881, and since January 18, 1888, aggregating many years of trespass upon said plantation, for which Learned was not liable in this suit. The court, in its instructions, correctly confined plaintiffs to a recovery for wrongs done by Learned or his servants to their inheritance after February 8, 1881, for there is no pretense upon the evidence that he trespassed upon Black Creek plantation before that time, and before January 18, 1888, when the eldest of the plaintiffs came of age, as all trespasses committed by him since said time are barred. And yet evidence of trespasses committed before February 8, 1881, and since January 18, 1888, was freely and abundantly submitted to the jury, to the great detriment of the defendant. While the instructions put a proper limit upon the period during which plaintiffs could recover, the evidence relating to the cutting of the trees upon the lands to which plaintiffs were entitled in reversion extended ⁷⁸¹ to trespasses manifestly committed during a course of many years before and after the time for which defendant was liable to plaintiffs in this action, and for which it is evident from the record that the defendant is not liable in this action. The sawmill books of Learned furnished no evidence to determine his liability in this suit, and were not admissible in evidence, and the stumps of trees counted by McGraw and the Taylors in nowise tended to fix the number of trees cut by Learned, or his servants under his direction, during the period for which he may be made responsible in this suit. In order that plaintiffs may have a recovery from the defendant, it is necessary for them to show with reasonable certainty what trees were severed by him or his servants from the soil, or what other injury was done by him or his servants to their inheritance, during the period for which the bar of the statute does not apply. The

sum here recovered is largely in excess of any sum justified by the evidence.

The fact that Ogden, the life tenant, should have protected the inheritance from injury, and might have sued for the injuries of others thereto, does not affect their right of action. Nor does his becoming the guardian of his minor children put the statute of limitations into operation so as to affect their right of action, for it is only where the legal title to the property is in the guardian that the statute of limitations begins to run. The legal title here was in the plaintiffs.

The verdict and judgment are contrary to the law and the evidence, and must be reversed.

Reversed and remanded.

A Life Tenant May Cut Timber for firewood, and for the repair of buildings: *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351. But if he cuts and sells it, he is guilty of waste: *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. Growing timber, on being cut down, becomes personal property: *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404, 49 Atl. 1051.

FEWELL v. AMERICAN SURETY COMPANY.

[80 Miss. 782, 28 South. 755.]

ASSIGNMENT of Contract with the National Government.—The primary purpose of the provision of the Revised Statutes of the United States, forbidding the assignment of contracts, is to protect the government, and such provision cannot be relied upon for the protection of others into whose possession moneys have come as the result of such an assignment. (p. 628.)

GARNISHMENT Cannot be Maintained Against a Partnership for a debt due by one of the partners. (p. 628.)

PARTNERSHIP.—The Usual Test of partnership as between the parties in a joint adventure is the intent to become partners. (p. 628.)

A PARTNERSHIP is not Created Between Several Creditors of a Contractor by a written agreement looking to the carrying out of a contract for their benefit. (p. 629.)

GARNISHMENT—What Subject to.—A Joint Debt—that is, indebtedness due to the defendant and another or others—may be garnished. This rule does not apply to debts due to a partnership of which the defendant was a member. (p. 630.)

ON THE GARNISHMENT of a Joint Debt Due to the Defendant and Others, the courts of Mississippi, under the code of that state, may take measures to ascertain and make certain the share which is due to him. (p. 631.)

Fewell & Son, for the appellants.

Miller & Baskin and Alexander & Alexander, for the appellees.

⁷⁸⁹ BRAME, S. J. In 1896 Stowell & Co. entered into a contract with the United States to erect a public building at Meridian, Mississippi. They gave bond conditioned for the performance of the contract, with the American Surety Company as surety. Said contractors being largely in debt, and not being able to complete the building, on June 30, 1897, entered into a written agreement with certain of their creditors looking to the carrying out of the contract for the benefit of the latter. The parties signing this agreement, besides the contractors, were the American Terra Cotta and Ceramic Company, E. R. Brainard, Michael D. Flavin, and the Allen Cornice Works, creditors and subcontractors. The Citizens' Savings Bank of Meridian, another creditor, signed also, and so did the American Surety Company.

This agreement recited the attitude and relation of the parties, and the inability of the contractors to proceed further, and it was stipulated therein that Street and Herzog, styled a committee, should take charge of the work, provide the necessary labor and material, and complete the building. It was further agreed that Stowell & Co. were from that time to have only a nominal connection with the contract, but that if necessary they were to sign all vouchers required by the government, and that the committee, Street and Herzog, should receive all moneys on such vouchers, and, after defraying expenses, distribute the same pro rata among the above named creditors of Stowell & Co. The agreement also provided for pro rata advances to be made by these creditors in order to complete ⁷⁹⁰ the work. Pursuant to the agreement, the committee completed the building, and it was accepted by the government, and a voucher for ten thousand dollars was issued therefor, and the money was collected thereon. In some way not clearly explained in the record, appellees, the said Citizens' Savings Bank and George M. Hodges, came into possession of this money, and, with full notice of the rights of all concerned, the said garnishees appropriated the money or applied it to the indebtedness of the bank in violation of the rights of the other creditors under said agreement. In December, 1898, Fewell et al., appellants, creditors of said other parties, sued out an attachment for one thousand dollars

against them, and, as we understand, against the American Surety Company; at the same time a garnishment was issued against Hodges, the Citizens' Savings Bank, and others. The record is not explicit as to who the several defendants were, or who was garnished (by agreement of counsel the original proceedings being omitted from the transcript), and the case being brought to this court on an issue made as to two of the garnishees. Plaintiffs in attachment having obtained judgment against the defendants, and the garnishees, Hodges, and Citizens' Savings Bank, having filed separate answers denying indebtedness to the defendants, the plaintiffs traversed these answers, setting out in a brief way the above facts as to the collection and conversion of the money and averring that each of the garnishees was indebted to defendants. The garnishees demurred to the traverses, and moved to strike the same from the files on various grounds assigned, the substance of which was that the assignment of the government contract was void, that the indebtedness was not such as could be reached by garnishment, and that the traverse was vague and insufficient. This was in July, 1899. The record does not show any disposition of the demurrers or the motions to strike out at that time. Thereupon the plaintiffs presented an amended traverse, averring at length and with more particularity the facts above stated as to the government contract, the agreement of June 30, 1897, the completion of the building, and the collection and conversion of the money by the garnishees, Hodges and Citizens' Savings Bank. The record does not distinctly show the date of presenting this amended traverse, or that it was filed. But the garnishees demurred to it and moved to strike out the same on the grounds substantially as above stated, and an additional ground of the motion was that the amended traverse was filed without leave of court. At the January term, 1900, the record shows that the motion to strike out the original traverses, and the demurrers thereto came on to be heard, and were sustained, and that thereupon the motion of the plaintiffs to file their amended traverse was overruled on the ground that the same presented no sufficient response to the answers of the garnishees. Plaintiffs excepted to the action of the court, and declined to plead further, and thereupon judgment final was rendered in favor of the garnishees, from which plaintiffs appeal.

The United States is not interested in this litigation. The contract was fully executed so far as the government was con-

cerned. The building was completed and paid for, and this controversy is alone between the parties hereto as to the disposition of the money received for its erection. Therefore, sections 3737, 3477 of the United States Revised Statutes, relating to assignments of contracts made with the government, have no application. The primary purpose of these statutes is to protect the government, and they cannot be relied upon for protection by parties situated as the appellees are: *Goodman v. Niblack*, 102 U. S. 556; *Bailey v. United States*, 109 U. S. 432, 3 Sup. Ct. Rep. 272; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870; *Freedman's Savings Co. v. Shepherd*, 127 U. S. 494, 8 Sup. Ct. Rep. 1250; *Yorke v. Conde*, 147 N. Y. 486, 42 N. E. 193, indirectly approved in 168 U. S. 642, 18 Sup. Ct. Rep. 234.

In *Howe v. Jolly*, 68 Miss. 323, 8 South. 513, it was held that the act of 1886, declaring that there shall be no property in intoxicating liquors kept for sale in violation of law, does not apply as between partners in such business so as to permit one partner to ⁷⁹²convert to his own use liquors unlawfully kept without liability to his copartner: See, also, *Gilliam v. Brown*, 43 Miss. 641. The principle is applicable here.

The decision in *Surety Company v. United States*, 76 Miss. 289, 24 South. 388, where the transfer or assignment involved here was held void, is distinguishable. In that case the government, for the use of another party, was suing on the bond of the surety company to enforce compliance with the contract. Being a party to the suit, brought to enforce the contract, it was in a position to successfully urge the invalidity of the assignment under the federal statutes.

The solution of the question whether the indebtedness alleged to be due by the garnishees to the defendants is subject to garnishment, has given us considerable difficulty. The garnishee *Hodges* was not a party to the agreement of June 30, 1897, under which *Street and Herzog*, styled a committee, were to carry out the contract with the government, complete the building, collect the money, and pay it over to the *Citizens' Savings Bank* and other creditors of *Stowell & Co.*, and hence it cannot be claimed that he was a partner of the defendants, or of any of the parties. If the said agreement of June 30th, and what was done under it, constituted a partnership, then it is plain that the garnishment cannot be maintained, certainly as to the bank, for it was a party to that agreement. It is well settled that garnishment, being a legal proceeding, and not adapted to

the investigation of accounts, cannot be maintained against a partnership for a debt due by one or more of the partners: *Williams v. Gage*, 49 Miss. 777.

But we do not regard this arrangement of the several creditors of Stowell & Co. as a partnership, at least as between the parties. It was but a single venture, an agreement made by creditors with a view to collecting their debts. It is true that trustees were selected, and expenses were to be incurred, and the money collected and disbursed, but it cannot be supposed that the parties, represented as they were by counsel, in 793 making this agreement, ever contemplated forming a partnership. As between the parties, in a joint venture, the usual test of a partnership is the intent of the persons to form one. If the parties do not intend to become partners, ordinarily they cannot be considered as such: 17 Am. & Eng. Ency. of Law, 1st ed., pp. 832, 833; and authorities cited. No rights of creditors or third persons are involved here. We regard this, as the parties themselves did, a mere venture of the creditors of a common debtor having in view the carrying out of a contract, and the collection of their debts. No partnership was contemplated, and none was created; the parties were mere joint creditors.

The contract with the government had been executed, the work had been done, and the money paid over. The defendants severally and the Citizens' Savings Bank were entitled to their respective shares of the same, and under the facts set up in the amended traverse we think an action could have been maintained by either of the parties for the recovery of the amount due, as for money had and received, or in assumpsit. This being true, garnishment is maintainable if a joint debt—that is, an indebtedness due to the defendant and another or others, can be subjected by that process. On this question the authorities are very much divided. We have carefully examined all those cited, and some others developed by our own research. In 14 American and English Encyclopedia of Law, second edition, page 798, the authorities are grouped, and the conclusion of the text is that such a debt is not garnishable. But a careful reading of the decisions, especially in view of the liberal provisions of our statutes, convinces us that the true rule is announced in the first edition of the Encyclopedia of Law, volume 8, page 1169, where it is said that a joint debt may be garnished. The authorities in support of the proposition are collected in the opinion of the court in the case of

Moore v. Gilmore, 16 Wash. 123, 58 Am. St. Rep. 20, 47 Pac. 239. and we approve that decision. See, also, Fogleman v. Shively, 4 Ind. App. 197, 51 Am. St. Rep. 213, 30 N. E. 909; and ⁷⁹⁴ Drake on Attachments, 572; Piper v. Hanley, 48 Vt. 479.

A number of the decisions cited in the new edition of the Encyclopedia of Law as being in opposition to the right to garnish a joint debt were made in partnership cases, and hence they are not applicable, it being, we believe, universally conceded that garnishment will not lie in such cases unless specially authorized by statute.

In the case of Kennedy v. McLellan, 76 Mich. 598, 43 N. W. 641, relied upon by appellees, it was held that a judgment in a garnishment proceeding, brought to subject the interest of one of two joint payees in a life insurance policy, was invalid, and the case is cited with others as holding that a joint debt may not be garnished. But the opinion of the court in that case was rested solely upon the fact that the other payee had not been brought in under an act of 1885 authorizing the interpleader of any third person having a claim to the property or debt, or a "part thereof." We think if the other payee had been made a party, the garnishment judgment would have been upheld. Therefore the case is as we view it, an authority in support of the proposition that a joint judgment may be garnished where there is an interpleader statute such as we have.

Section 2143 of our Code of 1892 provides that where the garnishee, before or after final judgment against him, shall show that another person claims title to or "an interest in the debt." or property due from him or in his hands, the court shall suspend all further proceedings and summon such person, and provision is made for protecting his interests. This being done, it is impossible by the garnishment proceedings to prejudice the rights of such joint owner or to put him in a worse attitude, and the possibility of doing this is the reason generally assigned against the proceeding by those courts which hold that a joint debt is not garnishable.

It is true as argued that the amount of the indebtedness due each of the several defendants is uncertain, and that there may be difficulty in fixing it, but this practical difficulty cannot ⁷⁹⁵ affect the general rule or control the jurisdiction. Similar obstacles are encountered in many actions at law. If the ac-

counts are intricate, the court may direct a trial by referees under section 743 of the Code.

It is urged against the garnishment that as the amount is uncertain, the garnishees could not know what amount to pay into court. If the right of paying into court ever affected the question we are considering, we do not think it does so now. As a condition precedent to the right to interpleading a third person, the Code of 1880, section 2449, required that the money should be paid into court, but this was changed by section 2143 of the Code of 1892, and now the requirement does not exist, though the garnishee may pay the money in, if he so desire, and by so doing be relieved from all further liability as to the sum so paid. The traverse refers to Street as one of the garnishees, though he is not a party to this appeal. If, as argued, he was not made a party to the garnishment, he may be interpleaded. In *Kellogg v. Freeman*, 50 Miss. 127, it was said that our mode of interpleader in garnishment cases is a substitute for the remedy by interpleader in equity. As further illustrating the extended powers of the court in matters of procedure under the statute, see *Morin v. Bailey*, 55 Miss. 570; *Horton v. Grant*, 56 Miss. 404; *Dodds v. Gregory*, 61 Miss. 351; *People's Bank v. Smith*, 75 Miss. 753, 65 Am. St. Rep. 618, 23 South. 423. In this connection it is not improper to consider also sections 751 and 752 of the Code of 1892, providing that such and so many verdicts and judgments, joint, separate and cross, as may be necessary to effectuate justice, may be rendered in the same case in actions at law.

We do not forget that garnishment as it exists with us is statutory, and is in the main, if not wholly, a legal proceeding. But it is remedial, and in view of the many liberal provisions of our statutes as to procedure, we do not think there is occasion for confining the remedy within narrow and technical limits, or that there is danger of causing any injustice or embarrassment to third persons by holding that a joint debt may be garnished. ⁷⁹⁶ It is easy to imagine cases in which it would be vitally important to proceed promptly by attachment and garnishment, in order to subject a debt or personal property of the defendant, and the fact that another is jointly interested in the debt or property is not in our opinion ground for denying the remedy in such cases and compelling a resort to a court of equity.

The amended traverse of the answers, though somewhat defective as a matter of pleading, showed a substantial right to

proceed against the garnishees, and it was error not to allow the same to be filed.

Judgment reversed, amended traverse allowed to be filed, and cause remanded for further proceedings in accordance with this opinion.

The Rights and Remedies of Partnership creditors are considered in the monographic note to *Smith v. Smith*, 43 Am. St. Rep. 364-380. A judgment creditor of a firm cannot reach, by garnishment proceedings, based on his judgment, a debt due to an individual partner: *Seigel v. Schueck*, 167 Ill. 622, 59 Am. St. Rep. 309, 47 N. E. 855.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CASE v. ESPENSCHIED.

[169 Mo. 215, 69 S. W. 276.]

HUSBAND AND WIFE—Provision for Wife.—A note in favor of a married woman, secured by deed of trust, without expressly reserving an interest in her husband, is presumed to be a provision for her, and he is not deemed to have a resulting trust therein, simply because he furnished the money for which the note was given in payment. (p. 636.)

HUSBAND AND WIFE.—Indorsement in Blank by the wife, of a note payable to her, is not the written consent required by statute for the transfer thereof to her husband, or for the passing of the title to a third person, by him. (p. 636.)

NEGOTIABLE INSTRUMENTS—Blank Indorsement by Wife Innocent Purchasers.—The blank indorsement by the wife of a note payable to her, and its possession thereafter by her husband, do not clothe him with an apparent ownership so as to estop her from claiming title to the note, as against an innocent third person to whom her husband has sold or pledged it. (p. 636.)

Lyon & Swarts, for the appellant.

J. M. Holmes, for the respondents.

217 MARSHALL, J. This is an action by replevin, without bond, to recover a note for six thousand dollars, made by Benjamin F. Lockhart on September 5, 1895, to the order of the plaintiff, and secured by a deed of trust, in her favor, upon a certain tract of land, in United States survey No. 890, in St. Louis county, containing seventy-eight and twenty-two hundredths acres. The petition is in the usual form, and the answer is a general denial.

At the close of the case the trial court, apparently *ex mero motu*, for no request therefor by either party appears in the

record, as is the necessary prerequisite to a special finding of fact under section 695 of the Revised Statutes of 1899, made the following special finding of fact: "I find as a fact in this case that the note in controversy was never the property of the plaintiff, and therefore find for the defendant." Thereupon, at the request of the defendant, the court decided the law to be that under the pleadings and evidence the plaintiff was not entitled to recover. From this judgment the plaintiff appealed, and now here contends that there is no evidence whatever to support the finding of fact, and further ²¹⁸ that upon the uncontradicted evidence in the case the plaintiff is entitled to a judgment as a matter of law.

The following facts appear by the record and are uncontradicted:

1. David W. Case, the husband of the plaintiff, was largely engaged in the building business in St. Louis, owned considerable property, and prior to 1897 was supposed to be quite well off. In 1893 he caused his foreman, Benjamin F. Lockhart, to buy the property herein referred to with money furnished by Case, and to take the title in Lockhart's name. Case then improved the property, by building a new barn, reconstructing the house, building a pond and planting fruit trees and established it as his summer home.

2. On September 5, 1895, Case caused Lockhart to make the note, and with his wife to execute the deed of trust involved herein, and to deliver them to him.

3. Mrs. Case testifies that her husband brought the note and deed of trust to her and gave them to her, saying he wanted to make provision for her and their children; that the indorsement of her name on the back of the note looks like her handwriting, but she has no recollection of having written it, and if she did so it must have been done at her husband's instance, as he attended to all their business, and she always signed whatever he told her to; that after keeping the note and deed of trust for two or three days she gave them to her husband to be by him placed in his box in the safe deposit company's vaults for safekeeping, and that she supposed they were safely there, and never authorized her husband to reduce them to his possession or to use them in any way, and never knew they were not so placed or that he had used them until after his disappearance on August 27, 1898.

4. On September 20, 1895, Case pledged the note and deed of trust to the Union Trust Company to secure his ²¹⁹ note

for four thousand dollars then given the trust company for a loan then made to him. The trust company knew that the payee named in the collateral note and deed of trust was the plaintiff, and that she was the wife of Case. No other or written authority was given by Mrs. Case to her husband to use the note or deed of trust for his benefit. The Union Trust Company carried the loan, so secured, for Case until January 20, 1897.

5. On January 20, 1897, Fred F. Espenschied, as trustee for the Bircher estate, knowing that the plaintiff was the wife of Case, loaned Case five thousand dollars and took his note, secured by the note and deed of trust in controversy here as collateral security; that is, he paid off the four thousand dollars Case owed the Union Trust Company, gave Case eight hundred and fifty dollars, and charged one hundred and fifty dollars commissions. So the matter stood when Case disappeared in 1898. Espenschied notified the plaintiff of his intention to foreclose the deed of trust. Plaintiff endeavored to obtain an extension of time so as to save something for herself and the children out of the property, which Lockhart conveyed to her after her husband disappeared. Failing in so arranging it, and being advised that she had title to the note and deed of trust, she instituted this suit to recover the note and deed of trust.

The law is settled in this state that when a husband buys land with his own money, and puts the title in his wife without expressly reserving, in the deed, an interest in himself, the law will presume he intended it as a provision for his wife, and he will not be deemed to have a resulting trust therein because he furnished the money: *Richardson v. Lowry*, 67 Mo. 411; *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259; *Gilliland v. Gilliland*, 96 Mo. 522, 10 S. W. 139; *Thomas v. Thomas*, 107 Mo. 220 459, 18 S. W. 27; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *First Nat. Bank v. Simpson*, 152 Mo. 638, 54 S. W. 506. And the same is true where he causes a note or deed of trust to be executed in her favor, as in the case at bar.

After so making provision for her, the property, if personal, became her separate property and cannot be reduced to possession by the husband or the title thereto passed to a third person by the husband, except by her written consent as provided for by section 4340 of the Revised Statutes of 1899. The mere

indorsement in blank of a promissory note payable to her by the wife is not such written consent as is required by the statute: *McGuire v. Allen*, 108 Mo. 403, 18 S. W. 282; *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396, reproducing and adopting the opinion of the Kansas City court of appeals in that case; *Winn v. Riley*, 151 Mo. 61, 74 Am. St. Rep. 517, 52 S. W. 27; *James v. Groff*, 157 Mo. 421, 57 S. W. 1081.

It was pointedly shown in *Hurt v. Cook*, 151 Mo. 429, 52 S. W. 396, that a blank indorsement of a note payable to a married woman does not clothe the husband with an apparent ownership so as to estop the woman from claiming title to the note as against an innocent third person to whom the husband has sold or pledged the note, for the purchaser or pledgee is charged with notice of the statute that such an indorsement confers no authority upon the husband to dispose of the note, and that nothing short of the written consent prescribed by the statute can invest the husband with such power.

In short, it is impossible to distinguish this case from the case of *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396. In fact, this is a stronger case in some respects in favor of the plaintiff than was the *Hurt* case. In the *Hurt* case the wife was permitted to recover, and the same result must be reached in this case.

It is true, this is an action at law in which the trial court has found the facts in favor of the defendants. This court will treat that finding as it would the verdict of a jury. But even the verdict of a jury must have some substantial evidence ²²¹ to support it. Here there is no evidence that even tends to support the finding of fact. On the contrary, the uncontradicted facts bring the case clearly within the rules laid down in the cases herein cited, especially *Hurt v. Cook*, 151 Mo. 416, 52 S. W. 396.

For these reasons the judgment of the circuit court is reversed and the cause remanded, to be proceeded with in accordance herewith.

All concur.

Resulting Trusts are considered in the monographic note to *Neill v. Keese*, 51 Am. Dec. 751-760. Where the purchase price of real property is paid by a husband, and the legal title is taken in the name of his wife, a resulting trust does not, ordinarily, arise, the presumption being that the conveyance was intended as an advancement: *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235. See, in this connection, *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34. And if money is deposited in bank by a husband in the name of his wife, and land is thereafter pur-

chased therewith, and conveyance made to her, it becomes her separate property, with no resulting trust in his favor: *Flanner v. Butler*, 131 N. C. 151, post, p. 773, 42 S. E. 547.

Paper Negotiable in form, made by insane persons, infants, or married women, is not within the rule which protects a bona fide holder of a negotiable instrument from defenses which the maker might make against the payee: *Hosler v. Beard*, 54 Ohio St. 398, 56 Am. St. Rep. 720, 43 N. E. 1040.

WELLS v. PORTER.

[169 Mo. 252, 69 S. W. 282.]

CONTRACTS—Deposit of Wheat—Loss by Fire.—If a deposit of wheat is made with a miller, for which he issues his signed certificate, wherein it is stipulated that, upon its return, the depositor is entitled to a certain number of pounds of flour and bran, but that the miller will not be "responsible for the deposit in case of fire or accident," the miller is not liable to the depositor for the loss of the wheat by the burning of the mill, whether the transaction be considered one of bailment, sale, or exchange. (p. 638.)

C. A. Calvird, for the appellant.

J. Parks & Son, for the respondent.

254 BRACE, P. J. This case is certified here by the Kansas City court of appeals, on the ground that one of the judges of said court deems the decision therein contrary to the previous decision of the St. Louis court of appeals, in *O'Neal v. Stone*, 79 Mo. App. 279.

The opinion of Judge Gill, deciding the case, in which all the other judges concurred, is as follows:

"The defendant was proprietor of a flouring-mill at Urich, in Henry county. In dealing with the farmers of that vicinity, they would bring their wheat, or at least such as they needed for their own use, and defendant would receive the same and execute to them certificates showing the amount of grain received, and what amount of flour and bran each was entitled to get on demand. As flour was furnished from time to time the amount would be indorsed on the certificate.

"Two of these certificates of deposit furnish the basis of this action. One was issued to plaintiff Wells, and was as follows:

“‘CERTIFICATE OF DEPOSIT

“‘Issued by

“‘URICH ROLLER MILLS.

“‘This is to certify that Mr. T. W. Wells has deposited at the Urich Roller Mills, 76 bushels and — lb. of wheat, for which is due him 2,432 lb. of flour and 760 lb. of bran, when this certificate is presented at the mill.

“‘Am not responsible for deposit in case of fire or accident.

“‘WM. PORTER,

“‘Proprietor.’

255 “Under this certificate of deposit there was delivered to plaintiff flour and bran at the dates indorsed thereon, six hundred pounds of flour and two hundred and fifty-five pounds of bran. Every time he came for the flour and bran and presented his certificate at the mill he received such flour and bran in such quantities as he desired. This action is for flour and bran not asked for or demanded, but left at the mill by plaintiff under the arrangement above indicated until the mill and its contents were destroyed by fire in May, 1896.

“The second certificate was issued to one Peek for wheat left by him at the mill, and a portion of the flour contracted for was delivered from time to time, but when the mill was destroyed there was still a balance to his credit. The certificates in the two cases were substantially the same except as to the name of depositor and amount of wheat, flour, etc., and on the face of the latter was indorsed the words: ‘Depositors assume all risk of fire, lightning and tornado.’ Signed ‘Wm. Porter, Prop.’ To save multiplicity of suits, doubtless, Peek assigned his claim to Wells, and hence this action is grounded on the two deposits.

“It is conceded that when the mill burned there was a large quantity of flour and bran on hand—more than sufficient to answer the demands of all such depositors—and that the mill and contents were destroyed without any negligence or fault on the part of defendant. On this state of facts the trial court directed a verdict for defendant, and from a judgment in the latter’s favor, plaintiff appealed.

“1. The judgment is for the right party, and will be affirmed. The paper executed when the wheat was delivered at defendant’s mill shows clearly that the parties intended that the flour and bran to be taken in exchange for the wheat was to be held at the depositors’ risk of destruction by fire. It is immaterial whether the transaction be considered one of bailment, sale or exchange—whether it was intended that title 256 of the wheat

passed immediately on placing it in defendant's bins, or whether property in the flour to be taken in exchange was vested in the depositor then or was to become vested in the future. The contract remains the same, to wit, that if the flour and bran held in the mill to answer the demands for such depositors should be destroyed by fire, it should be the loss of such depositors to the extent of whatever balance they might then have there to their credit. This is the plain meaning of the contract entered into by the parties at the time. This being so, plaintiff cannot now be heard to the contrary. Whether reasonable or unreasonable it matters not, the parties made the contract and must abide by it. The plaintiff and his assignor agreed that defendant 'should not be responsible for deposit in case of fire'; the depositors 'assumed all risk of fire.'

"The cases of *Martin v. Ashland Mill Co.*, 49 Mo. App. 23, and *O'Neal v. Stone*, 2 Mo. App. 401, do not save plaintiff's case. The provisions of contract, such as we have here, were not passed on in either of those cases. They were made to turn on the question as to where was the title of the deposited wheat at the date of the fire. In the absence of a contract to the contrary, the loss was held to follow ownership. The wheat was held to pass by sale or exchange, that there was no bailment, while here we are not concerned with the question whether the transaction was a sale, exchange or bailment. It is sufficient, whatever it may be, that a contract was made that imposed the loss of the flour and bran on the party leaving the wheat at the mill (the 'depositor') whether he be a bailor or vendor. It results, then, that the judgment, which was for the defendant, should be affirmed, and it is so ordered.

"All concur."

The case of *O'Neal v. State*, 79 Mo. App. 279, was tried in the circuit court before the court without a jury; finding and judgment for the plaintiffs and defendant appealed. The question presented for the decision of the court of appeals is thus stated by that court: "No declarations of law were asked or given on the part of the plaintiff. The defendant asked numerous instructions, all of which but one were refused, and that given only in modified form. From this action of the court we are reasonably informed that the court found from the evidence that the deposits of wheat made by the plaintiff and his assignors were in fact sales and not bailments." Upon the question thus presented the ruling of the court was as follows:

"We agree with the learned circuit judge that the several transactions counted upon in the plaintiff's petition were sales, and not bailments, and that the loss by fire must fall upon the defendant and not upon the depositors. Judgment affirmed. All concur." In that case the action was on ten certificates of deposit of wheat. On the backs of eight of them was the following indorsement: "Owners assume all risk by fire." And in the body of the other two was contained the following clause: Said depositor "agrees to assume all damages by fire, lightning, tornado, and all causes unavoidable by said R. C. Stone."

In the opinion not one word is said about the bearing of these parts of the contracts upon the defendant's liability. The whole opinion, from the statement of the question to the ruling, is devoted to the maintenance of the proposition that the contracts were bailments, and the ruling is made as the necessary sequence thereof. Hence, Judge Gill is right in saying it was "made to turn on the question as to where was the title of the deposited wheat at the date of the fire," and that the holding was that it passed by "sale or exchange," there was no "bailment" and the loss followed the "ownership."

Whatever may be said of the disposition of that case by this ruling, "it hath this extent no more," and "did not save plaintiff's case." For we agree with the Kansas City court ²⁵⁸ of appeals that whatever name may be given to the contracts in this case, whether sale, exchange or bailment, it is sufficient "that a contract was made that imposed the loss of the flour and bran on the party leaving the wheat at the mill ('the depositor') whether he be bailor or vendor." If anything in the decision in the case of *O'Neal v. Stone*, 79 Mo. App. 279, seems to conflict with the ruling of the Kansas City court of appeals in this case, it ought to be disregarded. Hence, for the reasons given by that court in its opinion the judgment of the circuit court is affirmed.

All concur.

Loss by Fire.—A warehouseman is not liable for losses by fire not attributable to his lack of ordinary care: *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430; monographic note to *Schmidt v. Blood*, 24 Am. Dec. 155; *Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92; *Railroad v. Kelly*, 91 Tenn. 699, 30 Am. St. Rep. 902, 20 S. W. 312. And a carrier may stipulate against loss by fire not the result of negligence: See the monographic note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 103.

UNITED STATES CASUALTY COMPANY v. KACER.

[169 Mo. 301, 69 S. W. 370.]

INSURANCE—Interest of Beneficiary.—There is no difference between an accident and an ordinary life insurance policy, as to the interest which the beneficiary takes therein. (p. 644.)

EVIDENCE—There is no Presumption of Survivorship in Case of a Common Calamity.—He who claims a right by virtue of such survivorship must prove the fact of the survival of him through whom he claims. (p. 644.)

INSURANCE—Interest of Beneficiary—Distribution.—The statute of descents and distributions has no application to a policy of life insurance as affecting the interest of the beneficiary therein, in case of dispute as to the survivorship of the insured, and the beneficiary named in the policy. (p. 646.)

INSURANCE.—Interest of Beneficiary—Change of.—The beneficiary in a policy of life insurance has ab initio a vested interest in the policy and in the money which is to become due under it, which neither the assured nor the company can impair or take away by any act or deed, without his consent. (p. 646.)

INSURANCE—Interest of Beneficiary—Survivorship.—If a life insurance policy names a certain person as beneficiary, if he survives the insured, otherwise the fund to go to the latter's legal representatives, the named beneficiary takes a vested interest in the policy and fund, subject only to be divested by his death prior to that of the assured. The latter's representatives take only a contingent interest, to take effect in case of the death of the named beneficiary, before the death of the assured. In case of dispute as to whether the assured or the named beneficiary died first, the burden of proof is on the legal representatives of the assured to show that he survived such beneficiary, and, failing in this, the fund must be paid to such beneficiaries' legal representatives. (p. 649.)

EQUITY JURISDICTION.—Courts of equity have power to appoint a trustee whenever it is necessary to protect, assert, or defend a right to property that is properly in the custody of such court. (p. 650.)

TRIAL—Waiver of Exceptions.—Exception to the action of the court in appointing a trustee for a deceased beneficiary to insurance in an interpleader case, instead of an administrator ad litem, if not taken at the term at which such appointment is made, is waived. (p. 650.)

W. F. Woerner, for the appellant.

W. S. Anthony, W. H. Clopton, J. H. Zumbalen, and J. S. Lowrie, for the respondent.

306 MARSHALL, J. This is a bill of interpleader in equity to determine the right to eight thousand dollars, proceeds of two policies of accident insurance, issued by the ³⁰⁷ plaintiff upon the life of Harry C. Yocum, and by the company paid into court. The interpleaders represent, respectively, the legal rep-

representatives of Harry C. Yokum, the assured, and his daughter Florence, the primary beneficiary under the policies.

At the request of the appellant, the circuit court made a special finding of fact under section 685 of the Revised Statutes of 1899, which, although not binding upon this court in this equity case, fairly, and for all the purposes of this case substantially, states the facts shown upon the trial, and it is therefore adopted by this court. It is as follows:

"On June 16, 1897, Harry C. Yocum, of St. Louis, a widower, made two applications, on the printed blanks furnished by the company, to the United States Casualty Company of New York, for policies of accident insurance of five thousand dollars each. These applications were made to the agent of the company in St. Louis. These applications are in the usual form, containing information as the basis for the policy. They include a printed form as follows: '14. I desire the death benefit made payable'—then follows a blank for the name of the beneficiary, relationship and postoffice address. This blank was filled in with the written words, 'Miss Florence Yocum, daughter, Planter's House, St. Louis, Mo.' On these applications two several accident policies were issued on July 6, 1897, to Yocum, containing the usual provision for the payment of indemnity for loss of life occasioned by external, violent and accidental means. By the terms of each policy, the indemnity for loss of life was made payable to 'Miss Florence Yocum, daughter, if surviving, if not, to the legal representatives of the insured'; the words, 'Miss Florence Yocum, daughter,' being written, the remaining words of the clause being in print and part of the printed form of the policy. These policies were for one year, and, at the expiration of the year, were renewed without change of terms for another year. The first ³⁰⁸ clause in each policy begins as follows: 'In consideration of the agreements and warranties in the application for this policy, which application is made a part of this contract of insurance,' etc. Florence Yocum was the only child of Harry C. Yocum; was between eighteen and twenty years old; was living with and dependent upon him. Yocum was fifty-one years old.

"On December 30, 1898, Yocum with his said daughter and two young lady friends left New Orleans on the naphtha yacht 'Paul Jones,' to make a trip over the Gulf of Mexico to Belle-aire, a point on the Florida coast. The yacht was about fifteen feet wide by fifty feet long. It was propelled by an explosive engine with naphtha for fuel. The crew consisted of a pilot,

an engineer and two hands. The yacht failed to arrive at its destination. Search was instituted by the father of one of the girls in the party, and at length on the shore of an island in the gulf fragments of the yacht were found; also a portion of the hull. The naphtha tank was also found intact and containing naphtha. The body of Miss Taggart, one of the party, was found in April, 1899, on a small island, dressed, with the exception of shoes. The body of the pilot was also found on another island about thirty miles distant about the same time. No other bodies were found.

"I find from the evidence that the yacht 'Paul Jones' was wrecked, and that all on board, including both Harry C. Yocum and his daughter, perished. There is no testimony to show how the disaster occurred—whether by storm or collision. I cannot find as a fact that Harry C. Yocum survived his daughter, or that she survived him; nor can I find that they both died at the same moment; or that they died from the same immediate cause. These facts of manner and time of death are not capable of being judicially ascertained.

"On the foregoing facts, I find, as a matter of law, that ⁸⁰⁹ the representatives of Florence Yocum are entitled to the proceeds of the policies."

In addition to such finding of facts and conclusion of law the learned trial judge rendered an able, clear, and comprehensive opinion, which counsel have reprinted in full in the briefs and which has been of much service to this court in the examination and adjudication of this case. The trial judge held: 1. That the application and policy must be construed together and harmonized, if possible, and that there is no inconsistency between them in respect to who should be the beneficiary or beneficiaries thereof; that is, that the printed provision of the policy providing that if Florence did not survive her father, the policy should be payable to his legal representatives, was an additional and not inconsistent to the provision of the application that the loss should be payable to Florence; and 2. "That even in case where the contract of insurance is to pay the beneficiary named, 'if surviving,' such beneficiary takes a vested interest, subject to be divested if he fails to survive; and that until it is proved that he failed to survive, his legal representatives have a prima facie right to the proceeds of the policy."

From this decision the representatives of the assured appealed.

It is due to counsel for the respective parties hereto to say that their briefs are full, forceful, and exhaustive of the sub-

ject and leave no light unturned upon the controversy, and that with the opinion of the trial judge, they have materially lightened the labors of the court, in this rather unusual and very interesting case. The view herein taken renders it unnecessary to decide all the questions presented. The first inquiry in such a case as this necessarily is, What interest ³¹⁰ does the beneficiary take in an ordinary life policy? And there is no difference as to an accident policy. The appellant differentiates between the policy and the fund to arise out of the policy, and says the beneficiary has a vested interest in the policy, but not a consummated, complete right to the fund. Or, otherwise stated, the beneficiary has a vested interest in the policy but only a conditional interest in the fund. On the other hand, the respondent contends that a beneficiary has a vested interest in the policy and the money to become due under it, which cannot be divested by the assured or the company, or both, without the consent of the beneficiary, and in case the beneficiary dies before the assured, that vested interest passes to the legal representatives of the beneficiary as a chose in action.

The subcontentions of the respective parties are, that the appellant contends that if the policy is payable to a primary beneficiary "if surviving," and if not to an alternative beneficiary, the term "if surviving" is a condition precedent to the right of the primary beneficiary or his legal representatives to recover, and hence the burden of proof is upon him or them to prove that he survived the assured. On the other hand, the respondent contends that the term "if surviving" is a condition subsequent, and that the primary beneficiary or his legal representatives must recover unless it be proved that the primary beneficiary did not survive the assured, and hence the burden of proof is upon the alternative beneficiary to show that the primary beneficiary did not survive the assured. And incidentally the parties hereto have considered the question of the rule in case of the death of two persons in a common disaster. This proposition is best disposed of before considering the other questions raised.

In all jurisdictions that proceed according to the policy of the common law, there is no presumption as to survivorship in case of a common calamity. The rule is that he who claims a right by virtue of survivorship must prove the ³¹¹ fact of the survival of him through whom he claims, and that failing in this, the property or fund remains vested as it was before the calamity: Lawson's Law of Presumptive Evidence, p. 298, rule 54.

The rule is stated in 1 Taylor on Evidence, ninth edition, page 183, as follows: "A mass of ingenious reasoning clusters about the question, What presumption of survivorship exists when several persons perish in a common accident? The common sense of English law, after some slight attempts to adopt them, discards the intricate presumptions of the civil law, as based on age, health, sex, etc., and adopts the rule that there is no presumption on the subject whatever; that he who relies on the fact of survivorship must establish it as best he can."

Greenleaf on Evidence, 16th edition, after speaking of the presumptions that obtain according to the Roman and civil laws, says, in note 5 to section 30, page 126: "The rule as now established by the English and American cases is, that where it is proved that two or more persons perished in the same calamity, there is no presumption of law that one survives the others, or that all perished at the same time; the burden of proving that one survived the others, or that all perished simultaneously, is on the person who asserts such to be the fact."

The inquisitive legal mind will find the subject discussed and the principal decisions collated in a note to the case of *In re Wilbor*, 51 L. R. A. 863, which is so exhaustive that a reference to it is all that is necessary to dispose of this incidental proposition in this case, and which leads to the abbreviated statement of the law that there is no presumption, but it depends upon the fact, and the fact must be proved by him whose recovery depends upon the establishment of the fact of survivorship.

But this does not settle the case, because the representatives of the father and daughter each claim that the rights ⁵¹² of the other depend upon their showing which of the two survived the other, and hence each claims the burden of proof is upon the other. The representatives of the father further claim that if neither can prove what the fact in this regard was, then the doctrine of "distribution" applies, and the fund must go where it would have gone if there had been no appointed beneficiary in the policy, to wit, to the representatives of the assured. In support of this contention counsel cite many cases relating to the disposal of property, where two persons entitled thereto in the alternative, perish in a common disaster, and which hold that in such cases the property is distributed according to the statute of descents. Types of such cases are *Fuller v. Linzee*, 135 Mass. 468 (sed quare. Is this case overruled by *McFarland v. Brayton*, 177 Mass. 533, 83 Am. St. Rep. 291, 59 N. E. 436?); *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 121; *Hill*

Harbrandt v. Ames (Tex. Civ. App.), 66 S. W. 128 (sed contra, *Irwin v. Travelers' Ins. Co.*, 16 Tex. Civ. App. 683, 39 S. W. 1097, and decisions of supreme court of Texas in *Insurance Co. v. Ireland*, 17 S. W. 617; *Splawn v. Chew*, 60 Tex. 534; *Byrne v. Casey*, 70 Tex. 247, 8 S. W. 38).

Upon this contention the circuit court properly held that those cases had application only to the distribution and transmission of estates, and were totally inapplicable to policies of insurance. One essential difference is sufficient to point the rule. In cases of ordinary property no one has any vested interest during the life of the absolute owner thereof, under the maxim, "*Nemo est haeres viventis*," but has only an expectancy, dependent upon the death of the owner during the lifetime of the expectant, and upon the further contingency that the owner did not dispose of the property by deed, gift or will, made before his death. Whereas, in case of a policy of insurance, the beneficiary has, ab initio, an interest in the policy which neither the assured nor the company can impair or take away by any act or deed ³¹³ without his consent: *Masonic Ben. Assn. v. Bunch*, 109 Mo. 580, 19 S. W. 25.

This naturally leads to the question, What is the nature and character of the interest that the beneficiary in a life insurance policy has? In *Central Bank v. Hume*, 128 U. S. 206, 9 Sup. Ct. Rep. 44, Mr. Chief Justice Fuller, speaking for the supreme court of the United States, said: "It is indeed the general rule that *a policy, and the money to become due under it* [the italics are superadded to point the applicability of the language used to the respective contentions of the parties hereto as to the interest of the beneficiary in the 'policy' and in the 'fund'] belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named."

The rule is thus stated in 3 American and English Encyclopedia of Law, 2d edition, page 980: "In ordinary life insurance, where no power of divestiture is reserved, the general doctrine prevails that the issue of the policy confers immediately a vested right upon, and raises an irrevocable trust in favor of, the party named as beneficiary, a right which no act of the insured can impair without the beneficiary's consent." In support whereof cases are cited in note 10, which show this to be the rule in England, Canada, supreme court of the United States, Ala-

bama, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas and Virginia. It is further noted (3 Am. & Eng. Ency. of Law, 2d ed., 982) that a contrary doctrine prevails in Tennessee and Minnesota, where it is held that the beneficiary has no such interest as would prevent the insured from disposing of the policy by assignment, will, or change of beneficiary. And ³¹⁴ (3 Am. & Eng. Ency. of Law, 2d ed., 984), it is pointed out that in *Gambis v. Covenant etc. Ins. Co.*, 50 Mo. 44, it was held that in case the policy was made payable to the wife of the assured, and she died, and the assured married again, the assured had a right to change the beneficiary named in the policy and make it payable to the second wife instead of to the first wife. The reasoning upon which this conclusion was based was that it must be supposed that the husband intended to make a provision for his wife in case he died before she did, and that he did not intend after she had died (he being alive) to spend his money keeping alive a policy for the benefit of his deceased wife's relatives who did not even have an insurable interest in his life, and as he had changed the beneficiary, and had died, and the company had paid the insurance to his second wife, it was held that the administrator of the first wife's estate could not recover from the insurance company again. This reasoning overlooks the fact that if the husband did not want the insurance to go to the representatives of the first wife and desired to provide for the second wife, the way was open to him to so arrange it, by simply letting the policy lapse for nonpayment of premiums, so far as he was concerned (but the deceased wife's representatives could prevent a forfeiture of the policy by paying the premiums), and by taking out a new policy for the second wife. The decision is evidently influenced by the consideration that the deceased wife's representatives had no insurable interest in the life of the husband. But this overlooks the fact that they recover by reason of the policy being a chose in action of the wife, and not by reason of their having any insurable interest in the husband's life.

The American and English Encyclopedia of Law does not note that this case is practically overruled by the cases of *Masonic Ben. Assn. v. Bunch*, 109 Mo. 580, 19 S. W. 25, which case is followed and expressly approved in *Wells v. Mutual Ben. Assn.*, 126 Mo. 638, 29 S. W. 607, and the right of substituting

beneficiaries is ³¹⁵ limited to benefit certificates in fraternal beneficial associations, because such right of substitution is reserved to the assured by statute or by the terms of the constitution and by-laws of such associations, but as to ordinary life insurance it is expressly said that the beneficiary has a vested interest in the policy. To avoid further misunderstanding the case of *Gambbs v. Covenant etc. Ins. Co.*, 50 Mo. 44, is hereby expressly overruled.

It being thus ascertained that the beneficiary of an ordinary life policy has a vested interest in the policy and the money to come out of it, the next question in this case is, What is the true meaning of the terms "if surviving"? Does this destroy the vested interest that without such provision in the policy would pass to the beneficiary the moment the policy was issued, and make the interest of the beneficiary a contingent one dependent upon the beneficiary surviving the assured? In other words, do those words create a condition precedent, or do they leave the interest of the beneficiary a vested interest, but liable to be defeated by the death of the beneficiary before that of the assured—in other words, do these words create a condition subsequent?

Without such words the interest of the beneficiary is a vested interest. The addition of such words does not change the nature or character of the interest of the beneficiary as long as the beneficiary lives. It only affects the question of who is entitled to the money arising out of the policy in case the beneficiary dies before the assured. Where a particular person is named in a policy, without any such or similar words of qualification, the interest of the beneficiary is a vested interest, and this being so, if the beneficiary dies before the assured, that vested interest passes to the legal representatives of the owner of such vested interest, and the interest is not divested or impaired by reason of the death of the beneficiary: 3 Am. & Eng. Ency. of Law, 987; American Digest, Century ed., p. 2391, sec. 1470 et seq.

³¹⁶ For the express purpose of avoiding this result and of controlling the channel of succession in case the beneficiaries died before the assured, the practice grew up of reserving a "divestiture" in such cases—that is, of providing that if the primary beneficiary was not living when the assured died, the policy and the money arising out of it should go to a named alternative beneficiary, thus preventing the same from passing to the legal representatives of the primary beneficiary, as it otherwise would do. This is called a reserved power of "divestiture."

Which means, of course, a divestiture of a previously vested interest, and not merely a divestiture of an expectancy, for if the interest of the beneficiary be merely an expectancy, dependent upon the beneficiary outliving the assured, then, of course, if the beneficiary did not do so, the expectancy would fail, and there would be no necessity for reserving a power of divestiture. No interest could vest under a mere expectancy, prior to the happening of the condition upon which it depended, and none having vested there would be nothing to divest.

Such terms in a policy, therefore, provide for a "divestiture" of the vested interest of the primary beneficiary, and create a contingent interest in the alternative beneficiary—that is, the alternative beneficiary only becomes entitled to the fund upon the happening of the contingent event of the death of the primary beneficiary before that of the assured. In other words, such a provision in a policy does not make the interest of the primary beneficiary a contingent interest dependent upon and to attach only in case of the death of the assured before that of the primary beneficiary, but creates a vested interest in the primary beneficiary which may be divested by the death of the primary beneficiary before that of the assured, and creates also a contingent interest in the alternative beneficiary to take effect only in the event the primary beneficiary died before the assured.

Or, otherwise stated, a policy payable to a named beneficiary, **317** but with such words of divestiture, creates a vested interest in the policy, and the money to arise out of it, in the primary beneficiary, coupled with a condition subsequent, that the vested interest shall be divested out of primary beneficiary and his representatives and vested in the alternative beneficiary upon the happening of the subsequent contingency, of the primary beneficiary dying before the assured.

It necessarily and logically follows that if the primary beneficiary has a vested interest which can only be divested upon the happening of a contingency, and the alternative beneficiary has only a contingent interest, dependent upon the "divestiture" of the vested interest of the primary beneficiary, the primary beneficiary or his legal representative is entitled to the policy and the money arising out of it, unless the alternative beneficiary shows by competent evidence, as a fact, that the vested interest has been divested and that the contingent interest of the alternative beneficiary has become a vested right by reason of the happening of the contingency provided therefor: *Paden v.*

Briseoe, 81 Tex. 563, 17 S. W. 42; Cowman v. Rogers, 73 Md. 401, 21 Atl. 64; Thomas v. Cochran, 89 Md. 390, 43 Atl. 792; Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1, and note.

In this case Florence was the primary beneficiary, and had a vested interest liable to be defeated by the happening of a condition subsequent. The legal representatives of the assured are the alternative beneficiaries, who have only a contingent interest, depending upon the happening of the condition subsequent, the divestiture of Florence's vested interest. Florence or her legal representatives are therefore entitled to the money, unless it is shown that her vested interest was divested. The alternative beneficiary is not entitled to the fund until the vested right of the primary beneficiary has been divested. If the vested interest is not shown to have become divested, Florence or her legal representative ³¹⁸ is entitled to the money. Neither she nor they, therefore, are called upon, in the first place, to prove a negative—that is, that she is not entitled to the money because her vested interest has become divested. But the alternative beneficiary is not entitled to recover unless the vested interest has become divested. The burden of proof is therefore clearly and logically upon the alternative beneficiary to show a divestiture. Inasmuch as no such proof is offered, or in the circumstances of this case could be offered, it follows that the money must go just as the policy provided, to wit, to Florence. The assured so arranged it. The company so agreed that it should go. The law leaves it where it is, because it cannot be divested or disturbed for want of proof that the vested rights of the primary beneficiary had become divested and the contingent rights of the alternative beneficiary had become vested.

There is no merit in the objection that the circuit court appointed a trustee for the legal representatives of Florence, instead of an administrator ad litem of her estate to act while the regular administrator was unable to act. This is a proceeding in equity, and such a court has a right to appoint a trustee wherever it is necessary to protect, assert or defend a right to property that is properly in the custody of the court. Moreover, the record does not disclose that the appellant objected to such action of the court when it was taken, or saved exception thereto by a term bill of exceptions. If this was not done it could not be saved in the final bill of exceptions, which was signed at a term subse-

quent to that at which the ruling complained of occurred: Richardson v. Schuyler County etc. Assn., 156 Mo. 407, 57 S. W. 117; Smith v. Baer, 166 Mo. 401, 66 S. W. 169.

The judgment of the circuit court is right, and is affirmed.

All concur.

Survivorship.—When two persons perish in a common disaster, there is no presumption of survivorship, and if survivorship is claimed, it must be proved: Middeke v. Balder, 198 Ill. 590. ante, p. 284, 64 N. E. 1002, and cases cited in the cross-reference note thereto.

Life Insurance.—Some authorities hold that the beneficiary named in a policy of life insurance has a vested interest in the fund during the life of the insured: Pittinger v. Pittinger, 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195; Jackson Bank v. Williams, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965. Other authorities take a contrary view: Schmidt v. Northern Life Assn., 112 Iowa, 41, 84 Am. St. Rep. 323, 83 N. W. 800; Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 85 Am. St. Rep. 263, and cases cited in the cross-reference note thereto. And in a recent case it is held that if a benefit certificate provides that the benefits shall be paid to the heirs of the assured in case the beneficiary dies before him, in the event of their both perishing in a common disaster, the heirs or representatives of the beneficiary have the burden of proving that he became entitled to the benefit fund by reason of surviving the insured: Middeke v. Balder, 198 Ill. 590, ante, p. 284, 64 N. E. 1002.

MULLINS v. RIEGER.

[169 Mo. 521, 70 S. W. 4.]

JURISDICTION—Appearance.—If one of several defendants is not served with process, an answer of defendants, without naming them, making no reference to the defendant not served, can be regarded only as the answer of the defendants duly served, and not as an entry of the voluntary appearance of the defendant not served, so as to give the court jurisdiction over him, and a false recital in the judgment that "now come the parties hereto by their respective attorneys," does not invest the court with jurisdiction to render judgment against the defendant not served and not appearing. (p. 658.)

JURISDICTION—Recitals in Judgment Record.—The doctrine of the absolute verity of the judgment record cannot apply when the want of jurisdiction of the court is the very question in issue, and this is true, although the plaintiff, in his petition, couples a count to have the judgment annulled with another count in ejectment praying for the possession of the land sold under the void judgment. (p. 532.)

JURISDICTION—Appearance—Recital in Judgment Record.—It is not necessary, in an action to set aside a judgment against a defendant not served with process, who did not appear, to allege that the

recital in the judgment that he did appear, or that his appearance was made by attorney, was corruptly or fraudulently induced or made. An allegation of the facts showing a lack of jurisdiction is sufficient. (p. 659.)

JURISDICTION.—Mere Recital in the Judgment record that a defendant appeared does not import conclusive and indisputable verity, but may be contradicted. (p. 660.)

JUDGMENTS—Presumption—Impeachment of Jurisdiction.—The general presumption in favor of the judgment of a court of general jurisdiction does not avail as an absolute conclusion against a party offering, in an independent proceeding, to show facts and circumstances, which go to the impeachment of the court's assumed and presumed jurisdiction in the particular case assailed, either by the court roll itself or by facts aliunde the roll. (p. 660.)

JUDGMENTS—Jurisdiction—Recitals in Record.—An erroneous adjudication of a fact by a court of general jurisdiction is conclusively true, but a false recital in the judgment of a jurisdictional fact is not conclusive, and may be contradicted. (p. 660.)

JURISDICTION—Appearance—Evidence.—The evidence of an attorney, who filed a general answer for defendants, without naming them, that he was not employed by a certain defendant, not served with process, and that he did not file an answer for him, and had no authority so to do, is competent to contradict a recital in the judgment record that such defendant appeared by attorney. (p. 661.)

Johnson & Lucas, for the appellant.

E. C. Wright for the respondent.

524 **ROBINSON, J.** This is an action in two counts. The purposes of the first count are to have the court declare void **625** a judgment against plaintiff in a prior proceeding, wherein he was named as one of the defendants, and to have set aside and for naught held a sheriff's deed to certain lands therein named, made by the sheriff at a sale under an execution issued upon said alleged void judgment, and to have removed the cloud cast upon the title of plaintiff's land by said sheriff's deed. The second count is in ejectment for the possession of the land named in said sheriff's deed.

In the first count of plaintiff's petition is set out the names of all the parties plaintiff and defendant in the proceeding which resulted in the judgment against him, and which, by this proceeding, is sought to be annulled, and who of the defendants were served and who not served. It is also alleged that no process in that action was ever issued for this plaintiff, and that none was ever served upon him, and that he did not enter his appearance therein either in person or by attorney, and that no answer was filed therein by him or on his behalf; that in said action against himself and others an answer was

filed in behalf of some of the defendants, but that he did not authorize the filing of same, nor did he employ the attorney for that purpose, nor did said attorneys intend, by filing of said answer, to enter the appearance of this plaintiff or plead for him in said action, and did not in fact enter his appearance or make a plea in his behalf.

The petition also contained an averment to the effect that as soon as plaintiff learned of the sale of his land and its purchase by the defendant herein, he offered to refund to him the sum of fifty dollars (the amount paid by defendant for the property at execution sale), and any additional sum by way of expenses that he might have been to in the premises, and that the defendant refused to accept same, but asserted that he was the owner of the property and entitled to its use and enjoyment, and refused to recognize plaintiff's claim thereto. A renewal of the tender of the money in court was also made by plaintiff.

526 The answer of the defendant in this suit joins issue with the plaintiff in all these averments of fact, and states that on September 21, 1895, he purchased the real estate mentioned in plaintiff's petition at sheriff's sale for the price of fifty dollars, which he paid to the sheriff and took a deed therefor. Defendant further avers that at the time he purchased said real estate and paid his money to the sheriff and took the sheriff's deed for the land, he had no notice whatever of the alleged claim that plaintiff now sets up, and had no reason to believe or suspect that plaintiff had any claim or equity whatsoever, but verily believes that the sheriff in offering said property for sale had the legal and equitable right to sell and convey said real estate to the purchaser who might at said sheriff's sale buy said land; that said sale was in all respects conducted according to law, and was fair and open; that in all respects, defendant relied upon the judgment of the circuit court of Jackson county, under which the sheriff's sale of the land was made, and that he acted in the utmost good faith and without any notice whatever of the plaintiff's alleged right and without any intention on his part to defraud the plaintiff herein.

At the trial, the plaintiff in this action testified that he knew nothing of the proceedings against himself and others that resulted in the judgment under which his land was sold, and knew nothing of the sale of his land until just a short time before the institution of this suit two years and more

after the sale had been made; that he was never served with process in the case of *John Keenan v. William C. Mullins* and others, that he never appeared therein and filed answer and that he never authorized or employed anyone else to appear for him or file an answer in his behalf in that case. The attorney who prepared and filed the answer in that case also testified that he had no authority to file an answer for this plaintiff in that suit, and that he did not undertake to file one for him, and did not so file an answer for plaintiff.

527 The record in the case of *Keenan v. Mullins* and others was also offered in evidence. On the back of the summons issued in that case, the following return of service by the sheriff was made:

"Executed this writ in Jackson county, Missouri, on the twenty-second day of December, 1891, by delivering a copy of this writ, together with a copy of the petition hereunto attached, to the within named defendant, R. H. Hamilton, he being the first defendant served. And further executed this writ on the same day by delivering a copy of this writ to the within named defendant, J. R. Hannan. And further executed this writ on the — day of December, 1891, by making diligent search for but failed to find the within named defendant John R. Mullins.

"WM. S. SITLINGTON,
"Sheriff.

"T. H. GATTNU,
"D. S."

The answer filed in that case was also offered in evidence, and is in the following language:

"In the Circuit Court, April Term, 1893.

"State of Missouri, }
Jackson County. } ss.

"JOHN KEENAN
v.
WILLIAM C. MULLINS. }

"Now comes the defendant and for answer to the petition of plaintiff herein says: They allege that the cost bond referred to in plaintiff's petition was signed by him or by his attorney; they admit that they are taking steps to enforce the collection of the costs adjudged against plaintiff as surety on said bond.

"They deny each and every allegation in the petition not herein expressly admitted. Wherefore, defendants pray that said injunction be dissolved, said suit dismissed, and that ~~such~~ such other orders be made in the premises as the court may deem just and proper, and for costs.

"FYKE & HAMILTON,
"Attorneys for Defendants."

No other process was ever issued in the case, except the original summons, on the back of which appeared the return quoted above. Upon this showing of facts the court entered the following judgment:

"Tuesday, April 10, 1894.

"JOHN KEENAN,

Plaintiff,

v.

WM. C. MULLINS, JOHN R. MULLINS,

R. H. HAMILTON and J. R. HANNON,

Defendants.

"Now comes the parties hereto by their respective attorneys, and all and singular the matters herein being heard and considered, the court does not find the issues herein in favor of the plaintiff and that plaintiff is entitled to the relief prayed for.

"Thereupon in open court come defendants, R. H. Hamilton and John R. Hannon, and enter their disclaimer herein. Thereupon it is considered, ordered and adjudged that the temporary injunction herein be made perpetual. That the judgment heretofore rendered by the circuit court of Jackson county, Missouri, at Kansas City, in case No. 8221, wherein John Crane and others were plaintiffs and the defendants herein were defendants, be, in so far as such judgment adjudges the plaintiff herein with the payment of the costs of that action, decreed null and void and be set aside, and that defendants, their agents and attorneys, be perpetually enjoined from attempting to enforce such portion of that judgment.

"It is further considered, ordered and adjudged that plaintiff have and recover of defendants, William C. Mullins ~~and~~ and John R. Mullins, his costs in this behalf, laid out and expended and have execution therefor."

It was under an execution issued upon this judgment that appellant's property was sold and purchased by the

respondent in this case. At the conclusion of the testimony in the present case the plaintiff prayed the court to give a peremptory instruction in his behalf, and defendant on his part requested a like instruction in his behalf. The court refused plaintiff's and gave defendant's instruction, and the case was brought here plaintiff, as appellant.

From the record before us we think the discussion on this appeal has taken a much wider range than the situation calls for. We have been favored with the most interesting and elaborate arguments, with citations of numerous authorities in support thereof upon the question as to the effect of an unauthorized appearance by an attorney for a defendant against whom a judgment had been rendered, but in our opinion that question is of little or no concern to the disposition of the case now before us. Notwithstanding the recitation in the judgment, "Now come the parties hereto by their respective attorneys, and all and singular the matters herein being heard and considered," etc., when the entire court roll is examined, it is readily seen that this recitation is erroneous; that, in fact, no appearance was made nor attempted to be made by anyone, purporting to act as the attorneys for the plaintiff herein, in the suit of John Keenan v. William Mullins and others, wherein the judgment against this plaintiff (who was one of the defendants in that suit) was rendered and under which judgment defendant's land was sold. The court roll shows that the firm of attorneys, Fyke & Hamilton, did at the April term, 1893, of the Jackson circuit court, file the answer copied above, for the defendant in the suit of John Keenan v. William C. Mullins et al., who were served with process, but that answer nowhere purports to be for and in behalf ⁵³⁰ of this plaintiff, as one of the defendants in that suit, but merely for the defendants without naming them. Both this plaintiff and the attorney who filed the answer in the case of John Keenan v. William C. Mullins et al. testified that this plaintiff never in fact appeared in that suit, as one of the defendants, and that he never filed an answer, nor did he in fact authorize an answer to be filed for or in his behalf. This testimony was not denied by anyone.

The court roll in the case of John Keenan v. William C. Mullins et al. disclosed the further fact (as appears from the return of the sheriff upon the summons issued in that case) that the defendants Hamilton and Hannon alone were served, and that after diligent search made, the sheriff failed,

to find the within named defendant, John R. Mullins (the plaintiff in this action) in his county. This brings us, then, to the consideration of the question, as to who in a general recitation in a judgment, as in this case, "Now comes the parties hereto by their respective attorneys," etc., is to be comprehended, when upon the face of the return on the summons in the case, all the defendants named in the suit had not been served with process.

Respondent contends that this general recital of the defendant's appearance in the judgment must be held and treated as conclusive evidence of that fact, and that in this independent collateral proceeding its verity cannot be questioned to discredit the force of the judgment as made and entered therein. Appellant, upon the other hand, contends that this recital in the judgment is to be considered more as a formula adopted by the clerk in writing up the judgment, than as a solemn finding by the court upon that fact, in view of the positive showing of the court roll that this plaintiff, John R. Mullins, in that suit did not in fact appear; that the recital in the judgment, "Now come the parties hereto by their respective attorneys," etc., should be interpreted to mean that only those parties appeared and filed answers who ⁶³¹ had been brought into court by its process duly served upon them. As said above, the court's jurisdiction of the defendant John R. Mullins in the case of John Keenan v. William C. Mullins et al. was not had by service of process upon him. The return upon the summons shows that fact; and if jurisdiction was ever acquired to authorize the judgment rendered, it must have been by the answer filed in that case by the attorneys, Fyke & Hamilton, who alone filed an answer for anyone.

When we look to the answer there filed we see that it is not an answer by Fyke & Hamilton, for the defendant, John R. Mullins, entering his voluntary appearance to make answer to the charges and allegations of plaintiff's petition in a suit in which he had not been served with process; but it was an answer for the defendants without naming them, which could not mean more than those defendants who had been duly brought into court, and who were required to make answer by reason of the court's authority over them on account of the court's process served (and of these John R. Mullins was not one). Without a special entry of appearance in the suit, by John R. Mullins in person or by attorney, in that

he was not served with the court's process, the court had no authority over him, and the mere erroneous or false recitation in the judgment, that he did so appear, would not give to the court an authority, which before the assertion it did not possess, or invest it with jurisdiction to render a valid judgment against the defendant John R. Mullins, which, without the existence of the fact recited, it was wanting in authority to do.

Nothing can be more illogical or wanting in judicial force than the contention made by the respondent and supported seemingly by some judicial dicta, that a judgment against a party under which his property has been sold must be held and treated as an indisputable record on the question of his appearance in the case wherein the judgment sought ~~582~~ to be annulled was rendered because the judgment in that case recites the fact that the defendant did so appear, and in the next place says that the judgment is an indisputable record because he did appear.

Marcy, J., in *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172, to illustrate and at the same time to emphasize the unreasonableness of such a position, thus states the rule: "The appearance makes the record indisputable verity and the record makes the appearance an indisputable fact," which is sophistry complete, and if indulged in makes a judgment a judicial web into which if by chance a citizen falls, he is inextricable, his constitutional right to a day in court to the contrary notwithstanding. Or, stated otherwise, the position of respondent resolves itself to this: The court creates a defendant's day in court, by the mere recital of the fact in its record, and the recited fact becomes an indisputable verity because it is the record of a court.

Such reasoning ignores the foundation upon which rests the right in any court to render a binding judgment against the citizen where his rights or his property is to be affected. Defendant must have had his day in court, that a valid and binding judgment against him may be entered, and maintained, notwithstanding the presumptions to be indulged in favor of the verity of judgments.

The doctrine of absolute verity of a record cannot apply where the want of jurisdiction of the court making the record sought to be annulled is the very question put in issue by the proceedings, and this is none the less true, because, as in this case, the plaintiff has joined in his petition to annul

a judgment and to set aside a sale of land made thereunder a count in ejectment for the possession of the land sold under said erroneous judgment, in the consideration of the issues under which last count, standing alone, the absolute verity of the judgment in question might not properly be assailed, according to the authorities cited.

533 If the court had no jurisdiction over this plaintiff (the defendant in the suit of Keenan v. Mullins et al.) it had no power to make the record as set out in the judgment under which plaintiff's land was sold, and the proposed record is not in truth and fact an absolute verity as against the plaintiff in the present proceeding; and further, it is not necessary that the allegations of a petition, seeking to have declared void, set aside, annulled, or for naught held, a judgment so entered against a defendant, where he was neither served with notice of the suit against himself, and where, notwithstanding the want of legal notice, he neither appeared nor authorized the entry of his appearance therein, charge that the recital of appearance in the judgment was corruptly or fraudulently induced or made, as contended for herein. For though the clerk may not have fraudulently made the entry in the judgment reciting the appearance of the defendant by his attorneys, in the sense that he intended the commission of a willful wrong, yet if he did it mistakenly (as was evidently done in the case in question, by treating the answer that was filed for the defendants without naming them, to include all defendants named in the petition, instead of the answer for those only who were in court by reason of its process duly served upon them, and of whom answers were required), the effect is the same to a defendant who is threatened with the loss of his property by the existence of the false recital. Though fraud in direct terms is not charged against anyone in the procurement of the judgment sought to be declared void by this proceeding, the facts and circumstances under which the judgment was entered are set out in the first count of plaintiff's petition, and those facts constitute ample warrant for the equitable intervention of the court to set aside, declare void, or in anywise to stay the force of the judgment so entered, regardless of the reason that may have prompted the untrue recital found therein, and without regard to the question whether or not actual intentional fraud was charged 534 to anyone in procuring or causing the untrue recital to be so made.

In view of the general practice by our circuit courts to permit the clerks thereof to make up the formal recitations set out in their judgments, such as, who of the parties to a suit were served with process, and who of the parties have made his or their voluntary appearance thereto, from the papers in the clerk's custody, and the court's acceptance of such recitals so made up by the clerk, as the fact appearing from the court roll without a personal examination of the roll itself by the court, it would be most dangerous to say that a record thus made up showing that due notice had been given to a defendant of the commencement of an action against himself or that he had appeared by attorney and filed an answer therein, should be held conclusive against an offer to show a contrary state of facts, either by the court roll itself or by facts independent of the court roll.

Recognizing the general presumption to be indulged in favor of a judgment of a court of general jurisdiction, where its jurisdiction over the parties to, and of the cause in which it has acted is not questioned, still that presumption is of no avail as an absolute conclusion, against a party offering in an independent proceeding, to show facts and circumstances which go to the impeachment of the court's assumed and presumed jurisdiction in the particular case assailed, either by the court roll itself or by facts aliunde the roll.

In the consideration of this case respondent has failed to note the distinction between those cases having under consideration a false recital of a jurisdictional fact in a judgment record, and those having for determination the question of an erroneous or false adjudgment of a fact or facts in the case by the court.

The latter in the very nature of things is, and must be, held not only presumptively true, but must be conclusively so ⁵³⁵ held and treated at all times (except on appeal), otherwise there would be no final settlement of disputed controversies.

As said, the case before us now for determination does not involve the consideration of the validity of a judgment, where the parties have once been before the court, or the rights of a third party who has purchased property on the strength thereof that was entered against a defendant upon a false or mistaken return, showing that the defendant had been properly brought before the court; nor does it involve the validity of a judgment entered against a defendant upon an appearance by an unauthorized attorney, nor are we called

upon to consider a case where a defendant's appearance has been procured or induced by some fraudulent practice or deception, which gave to the court the appearance of jurisdiction to render the judgment entered, but the facts before us present a case wherein the recitals in the judgment as to the appearance of the defendant in the proceedings wherein the judgment was rendered is wholly without support from the court roll or elsewhere; and further, where it is manifest at a glance that the record made was the result of a mistaken interpretation of the meaning of an answer that had been filed for and in behalf of other defendants in the case, but of which this plaintiff (as defendant in that suit) knew nothing, and in which proceeding he took no part whatever.

Nor is the point made by appellant here that the attorneys, *Fyke & Hamilton*, might not have appeared for him and filed an answer in his behalf in the case of *Keenan v. Wm. C. Mullins et al.*, that would have bound him although no service of process was ever had upon him therein; but the contention is that neither they as attorneys or otherwise did appear for him in the suit of *Keenan* against others and himself, nor did they attempt or pretend to do so, to furnish a pretense of jurisdiction over the person of this plaintiff to justify the judgment rendered against him, and under which his property was sold to the defendant herein.

536 The trial court heard the testimony of the plaintiff to the effect that he had never authorized the attorneys, *Fyke & Hamilton*, to appear for him and file an answer in his behalf in the case of *Keenan v. Wm. C. Mullins et al.* Also, that of the attorney, *Fyke*, who did file the answer for other defendants in that case, to the effect that neither he nor the firm of *Fyke & Hamilton*, of which he was a member, was authorized to file an answer for or in behalf of the appellant herein, and further, that he did not file an answer for this appellant in that case, nor did he attempt to do so; and yet after hearing such testimony, subject as it was to the objection made against it by respondent, it was stricken out by the court on the grounds that it was incompetent as impeaching testimony against the recitations of the judgment in controversy. In this the trial court committed error. The doctrine of absolute verity of a record does not apply when the want of jurisdiction in the court to make the record assailed is the very question in issue to be determined.

The judgment of the trial court is reversed and the cause remanded to be retried in accordance with the views expressed herein.

Brace, P. J., and Marshall and Valliant, JJ., concur.

The Vacation of Judgments, when not specially authorized by statute, is considered in the monographic note to *Furman v. Furman*, 60 Am. St. Rep. 633-663. The power to vacate judgments after the time specified by statute is considered in the monographic note to *Nicklin v. Robertson*, 52 Am. St. Rep. 795-799. And relief from judgments, other than by appellate proceedings in equity, is considered in the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-261.

Defective Service of Process, as affecting the jurisdiction of the court, is considered in the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 485-496. If a judgment of a court of general jurisdiction recites that service of summons was duly made, it must be presumed that that fact appeared to the court by competent proof: *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757, 65 Pac. 559. See, in this connection, *Burke v. Interstate Sav. etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879.

CASES

IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

TRAVELERS' INSURANCE COMPANY v. MOSES.

[63 N. J. Eq. 260, 49 Atl. 720.]

INSURANCE—Indemnity—Bankruptcy.—If a policy of insurance against loss sustained by an employer through accident to his employee provides that "no action shall lie against the insurance company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue," the insurance company is liable only for the amount paid by the employer on such judgment, and if his property is transferred to a trustee in bankruptcy, the insurer's liability is determined by ascertaining what percentage the assets of the bankrupt, outside of the policy, will pay on the debts proved against his estate, outside of the judgment, and the insurer's liability is the same percentage of such judgment. (p. 664.)

G. Holmes, C. C. Black, and C. L. Corbin, for the appellant.

F. Woodbridge, E. I. Myers, and A. H. Strong, for the respondents.

261 DIXON, J. The object of this bill is to enforce the contract made February 20, 1897, between the Traveler's Insurance Company and the Beacon Lamp Company, by which the insurance company agreed to indemnify the lamp company against loss from liability for damages on account of bodily injuries accidentally suffered by any employé of the lamp company up to February 15, 1898. The contract limited the liability of the insurance company to five thousand dollars for injuries to one person, and contained this provision: "15. No action shall lie against the [insurance] company as respects any loss under this policy, unless it shall be brought by the assured

himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue."

On January 12, 1898, the lamp company became liable to Mary Bardzik, one of its employés, for damages on account of bodily injuries accidentally suffered by her, and on January 23, 1899, she obtained judgment therefor against the lamp company in the supreme court of this state for six thousand and sixty-six dollars and seventy-eight cents after trial of the issue.

On the day last mentioned a petition in bankruptcy was filed against the lamp company in the United States district court for the southern district of New York, and in February, 1899, a similar petition was filed in the United States district court **262** for New Jersey, and thereupon, in March, 1899, the lamp company was adjudged bankrupt, and Aaron H. Moses was appointed trustee in bankruptcy and qualified as such. Afterward Mary Bardzik proved her claim in the bankruptcy proceedings and it was duly allowed.

On these facts the trustee and the lamp company filed this bill in equity against the insurance company, making Mary Bardzik also a party defendant, to require the insurance company to pay to her the sum for which it is responsible. Mary Bardzik answered, and in her answer set forth, "by way of cross-bill," the same facts as were stated in the complainant's bill, and prayed the same remedy against the insurance company. This company demurred to the bill and the cross-bill, and the chancellor having overruled the demurrer, it appeals.

The argument presented in support of the demurrer is based upon clause 15 of the contract above quoted, and raises the question whether the action is "brought by the assured to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment." The contention is that the lamp company has not paid the loss; that payment of the loss is, by the terms of the contract, a condition precedent to an action, and therefore no right of action has yet arisen.

By force of section 70 of the United States bankrupt act of July 1, 1898, the property of the lamp company was transferred to the trustee in bankruptcy on his appointment and qualification. This transfer was made for the satisfaction of all claims against the company provable under the act, and when the Bardzik judgment was so proved, it was for the satisfaction of that judgment. From that time the trustee became trustee for her to the extent of her share of the rights which had passed to him from the company, and to that extent the

company had actually paid her trustee and agent by the transfer of its property. The contract of the insurance company does not require the payment should be made in cash, and this payment in property is sufficient compliance with its terms.

Before payment was actually made by the lamp company, its right under the contract was substantial and valuable as an asset, but was immature. As soon, however, as payment was ²⁶³ made, its right became perfect, and eodem instanti passed by operation of law to the trustee, and the trustee became at once entitled to enforce it.

It is further urged by the demurrant that the right of action contemplated by the contract is one to be pursued at law, not in equity, being a mere money demand upon an express promise.

Doubtless such a right must ordinarily be so prosecuted, but in the present case the right is complicated by the necessity of taking an account of all the assets divisible in the bankruptcy proceedings and of the claims proved against those assets; for without that account it cannot be ascertained how much the lamp company has paid in satisfaction of the Bardzik judgment, which is the extent of the demurrant's liability. This complication justifies a resort to equity. We therefore conclude that the trustee is entitled to relief under his bill. The joinder of the lamp company as a complainant cannot be objected to on this demurrer. The demurrer to this bill was rightly overruled.

The cross-bill of Mary Bardzik should also be sustained. It prays no relief against the insurance company beyond that asked by the complainant; and as the complainant's prayer is that the sum due from the insurance company should be paid directly to her, thus in equitable effect assigning the complainant's claim to her, it was proper that she should affirmatively intervene to protect and enforce the right so acquired. At any rate, if there be any defect in her cross-bill, it is not so apparent as to be noticeable on general demurrer under the rules of the court of chancery: *Van Houten v. Van Winkle*, 46 N. J. Eq. 380, 20 Atl. 34.

The orders appealed from are affirmed.

The foregoing opinion indicates that the view expressed in the court below, to the effect that the insurance company is bound to pay five thousand dollars in any event, is not approved by this court.

The obligation of the insurance company was with the lamp company only, and is explicitly defined by the contract, which

limits it to such sum, not exceeding five thousand dollars, as the lamp company may have actually paid in accordance with the policy. No person claiming under this contract can enforce any larger obligation, for it rested wholly within the power of the contracting ²⁶⁴ parties, subject only to public law, to fix the bounds of liability. The claim of the trustee or of Mary Bardzik therefore must have the same bounds. The lamp company has paid, but it has paid with property, and it remains to ascertain in money the amount of the payment. That can be done without difficulty, when all claims against the bankrupt estate are proved, and all the assets, outside of his obligation of the insurance company, have been converted into cash or definitely valued. Then can be ascertained what percentage all the assets, other than this obligation will pay upon all the claims, other than the Bardzik judgment: and the same percentage of the judgment will be the amount of the liability of the insurance company, provided it does not exceed five thousand dollars, and if it does exceed five thousand dollars, the company will be liable for that sum. In this respect the present contract differs essentially from those wherein the insurer agrees to pay the damages for which the assured may become liable, such as were those considered in *Ross v. American Employers' Liability Ins. Co.*, 56 N. J. Eq. 41, 38 Atl. 22.

For Contracts Indemnifying persons from their liability to parties sustaining personal injuries, see Worcester etc. Ry. Co. v. Travelers' Ins. Co., 180 Mass. 263, 91 Am. St. Rep. 275, 62 N. E. 364; *Bain v. Atkins*, 181 Mass. 240, ante, p. 411, 63 N. E. 414; *Kansas City etc. R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 74 Am. St. Rep. 545, 52 S. W. 205.

LACEY v. DOBBS.

[63 N. J. Eq. 325, 50 Atl. 497.]

WILLS—Signature of Testator—Subscribing Witnesses.—Under a statute providing that “all wills and testaments shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses, present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator,” it is essential that everything required to be done by the testator, including his signature, precede in point of time the subscription of the witnesses. (p. 681.)

A. Eby and W. H. Eby, for the appellants.

A. Grant and H. F. Barrell, for the respondent.

325 COLLINS, J. The orphans court of Essex county admitted to probate as the last will and testament of Mary Ann Caldwell, deceased, a paper writing, her signature to which was proved to have been made after the subscription of the putative testamentary witnesses, although on the same occasion and while they were still present.

326 Upon affirmance in the prerogative court, by the decree that is the subject of the present appeal, the learned chancellor, sitting as ordinary, was largely influenced, if not controlled, by a deliverance in that court in 1858, in the case of Mundy v. Mundy, 15 N. J. Eq. 290, to the effect that the order of signing was not material to the validity of a will. The question has been directly involved in no other reported case in this state.

The first section of the supplement, approved March 12, 1851, to “An act concerning wills” (Gen. Stats. 3760), upon which all valid wills must rest, reads as follows: “All wills and testaments of persons dying after this act shall take effect, or who may have died since the fourth day of July, in the year of our Lord eighteen hundred and fifty, shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator; and all wills and testaments of person dying since the day above mentioned, made in manner prescribed, by any person competent by law to make such will, shall be sufficient to devise, pass and bequeath all estates and property, real or personal, and all rights of any

kind, and to appoint a guardian or guardians to any child of the testator during infancy."

The grammatical sense of this enactment is that the entire testamentary act is to be attested by two witnesses, by the subscription of their names. They are to subscribe "as witnesses"—i. e., as those who know (Saxon *witan*) what was said and done. They cannot know before the fact. But the apparent meaning of words must yield to authoritative judicial construction; and a judgment of the prerogative court, of long standing, although not binding in this court, should not lightly be overruled. Hence some elaboration seems proper in vindicating a determination contrary to the deliverance mentioned—the more so because of confusing adjudications elsewhere.

It will be found upon examination of the case cited that such deliverance was an ill-considered make-weight for a decision previously placed on a sound basis with which it was really inconsistent. The decree was mainly and rightly vested on the evidential force of the attestation signed by the testamentary **327** witnesses. It was said: "The attestation clause, with the signatures of the witnesses, is *prima facie* evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. If there is no attestation clause the case is different. In the one case there must be affirmative proof of publication and of the other requisites; in the other there must be affirmative proof of the want of those requirements." In *Allaire v. Allaire*, 37 N. J. L. 312, the present chief justice, speaking for the supreme court, said that the true principle had been so declared with exactness; and in *Allaire v. Allaire*, 39 N. J. L. 113, this court held that the legal rule was thus properly settled. But not content with this firm ground of decision, the learned ordinary, evidently without scrutiny of the statute, and without that careful consideration almost always displayed in his judicial utterances, went on thus to support it: "Mrs. Manning at one time says that she thinks her husband [one of the testamentary witnesses] signed before the testator. If the fact was clearly proved, it would not affect the validity of the will. The particular order of the several requisites to the valid execution of a testament is not at all material: *Vaughan v. Burford*, 3 Bradf. Surr. 78." This is most unsatisfactory. The order of the requisites to the execution of a will is not material. The testator may declare the "writing" to be his will before or after or contemporaneously with the

making or acknowledging of the signature, but attestation is a different matter. Of course the word "execution" was used—though inaptly—to include the subscription of the witnesses, and the New York surrogate's decision, on which too hasty reliance was placed, was to the effect stated, upon a New York statute like our own. That decision has since been repudiated by the court of appeals, and it is strange that so acute a reasoner as the writer of the opinion in *Mundy v. Mundy*, 15 N. J. Eq. 290, should not have seen the inconsistency of antecedent subscription of witnesses with his declared rule that "the attestation clause, with the signature of witnesses, is prima facie evidence of the facts stated in it." One of those facts must be the making or acknowledging of the testator's signature. The attestation clause, he had said, can only be overcome ³²⁸ by proof irreconcilable with its verity. When signed, therefore, in order to have such a probative force it must be true. The rule necessarily interprets the statute.

The rationale of the rule was very clearly stated by Vice-ordinary Van Fleet in *Farley v. Farley*, 50 N. J. Eq. 434, 439, 26 Atl. 178. He said that an attestation clause is "for the very purpose of preserving in permanent form a record of the facts attending the execution of the will, so that, in case of the failure of memory, or other casualty, they may still be proved. It is for this reason that the courts have uniformly held that, on proof of the authenticity of the signatures of the subscribing witnesses, the facts stated in the attestation clause must be considered and accepted as true until it is shown by affirmative proof that they are not." The late chancellor, sitting as ordinary, in *Darnell v. Buzby*, 50 N. J. Eq. 725, 727, 26 Atl. 676, tersely said: "The attestation clause recites particulars which assert complete obedience to all requirements of the statute, and the signature of the witnesses being admitted, that clause makes prima facie proof of all the facts stated in it."

If it be urged, as indeed it has been in some of the cases, that the legal presumption raised by the attestation clause is an arbitrary one, because the witness first subscribing cannot, in the nature of things, attest that the other subscribes in the testator's presence, the answer is that, in this regard, all that is required by the statute is that each witness shall so subscribe. The attestation is not joint, but several, and the witness subscribing does not attest the signature, but only the presence of his colleague.

To the argument that, as like effect is given to an attestation clause by those courts that hold the order of signing to be immaterial, it is at least disputable that such rule of evidence is inconsistent with that laxity, it is sufficient to reply that in any case all that need be attested is that for which the particular statute involved requires the presence of witnesses, and that no court has yet held that attestation can precede the testator's signature where the statute construed requires, in terms, as does ours, the making or acknowledging of such signature to be in the presence of the testamentary witnesses.

329 Before proceeding to consider direct adjudications on the question *sub judice*, it will be necessary to present the state of the law on the subject of wills at the time of the enactment of our present statute.

Testaments of personalty were, in England, until the reign of Victoria, left to the ecclesiastical courts unaffected by legislation. Devises of lands were *sub tempore* Henry VIII required, by act of parliament, to be in writing, but no formalities or attestation were prescribed. The statute of frauds of 29 Charles II, chapter 3, section 5, provided that such devises "shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect."

This statute inherently prevailed or was, in substance, enacted in the American colonies and the states of the Union, many of whom extended its provisions to testaments of personalty. In New Jersey a change, in phraseology at least, was made. In 1713-1714 it was enacted that "all wills and testaments which hereafter shall be made in writing, signed and published by the testator in presence of three subscribing witnesses and regularly proved etc. . . . shall be deemed sufficient to devise lands": Allison's Laws, p. 27.

This statute survived the Revolution. In *Compton v. Milton*, 12 N. J. L. 70, decided in 1827, Chief Justice Ewing called attention to the difference between it and the English statute of frauds. He said: "Under both, wills are to be in writing, to be signed and have at least three witnesses. Our act requires the will to be published, which is not expressly directed by the other. By the English statute the will is to be signed. By our act the will is to be signed and published in the presence of witnesses. By the former the witnesses are to attest and sub-

scribe in the presence of the devisor. By the latter they are not, in terms, required so to do, although it is our usual and commendable custom."

Like other provisions of the statute of frauds, its fifth section **330** was very loosely construed, and to remove the consequent uncertainty, as well as to bring testaments of personalty into uniformity with devises of land, "An act for the amendment of the laws with respect to wills" was passed by parliament, taking effect on July 3, 1837: 1 Victoria, c. 26. By section 9 it was enacted that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This statute soon came before the ecclesiastical courts, and in 1842 was carefully considered by Sir Herbert Jenner-Fust in the prerogative court of Canterbury: *Moore v. King*, 3 Curt. Ecc. 243. The great importance of the case as a leading one was perceived and expressed—the previous interpretations, though of the same tenor, having been *ex parte*: *In re Goods of Olding*, 2 Curt. Ecc. 865; *In re Goods of Byrd*, 3 Curt. Ecc. 117. These were the facts: The testator signed the draft of his will in the presence of his sister, who subscribed her name as a witness. On the next day he acknowledged his signature, in her presence and in the presence of another person, to whom the sister pointed out her signature, and who then subscribed as a witness. The will was held invalid for lack of conformity to the statute. It was observed that the new legislation was amendatory, and, in fact, had grown out of the loose construction that had been given to the statute of frauds, and the judge said: "I clearly find that the object of this act is to remove every possible doubt, thereby taking away all latitude and discretion in its interpretation." He declared his opinion that "the act is not complied with unless both witnesses shall attest and subscribe after the testator's signature shall have been made or acknowledged to them when both are actually present at the same time." He pointed out that the alternative of acknowledgment of the testator's signature, expressly given by the act, precludes any implication that the witnesses might ac-

knowledge their signatures ³³¹ previously made. The same learned judge reaffirmed his opinion the next year, in *Cooper v. Bockett*, 3 Curt. Ecc. 648, in a case where the testator signed on the same occasion as the witnesses, but after they had signed.

No English court has ever held that the statute of frauds permitted subscription of testamentary witnesses in advance of the testator's signature. When parliament passed the amendatory act such an anomaly had never, in any adjudged case, been presented or suggested. But in this country, before the New Jersey legislature acted finally in the premises, the subject had been judicially considered. In Kentucky, the statute of 1797 required that wills should be "signed by the testator or testatrix or by some other person in his or her presence and by his or her direction; and, moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses subscribing their names in his or her presence."

A will was drawn for a testator, and while still unsigned by him, was subscribed in his presence by two persons as if witnesses. Some hours later he signed it in their presence and in the presence of a third witness, who subscribed it, the first two, at the same time, acknowledging their subscription. In 1810 this will was established as valid by the supreme court of the state: *Swift v. Wiley*, 1 B. Mon. 114. A distinction was drawn between attestation and subscription. The judge said that subscription was required "for the sole purpose of identification." This was a misconception, for attestation of a will involves subscription, and there is a better argument in favor of the decision which I will later suggest. Under a statute practically identical with that of Kentucky, the supreme court of appeals of Virginia in 1849 held, *obiter*, that the order of signing as between testator and witnesses was not material: *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97. The signature of an illiterate testatrix had been written for her before the witnesses subscribed and the occasion of the dictum was her subsequently making her mark.

It will be observed that neither in the English statute of frauds nor in these American derivatives is it required that the testator's signature shall be made or acknowledged in the presence ³³² of the witnesses, and that under each statute it is the will that is the written disposition of the testator's property—not its due execution, that, in terms, is to be attested. It is consistent with such legislation that the writing shall be de-

clared to be the will of the testator, although his signature be not shown to the witnesses; and if, when probate is moved or the will in any wise comes in controversy, the true signature of the testator appears upon the attested document it may be fairly arguable there has been compliance with the law. In the old case of *Peate v. Ougly*, Comyn. 197, a jury was permitted to inquire of the due execution of a will which was so folded when the witnesses subscribed it that they could not know whether or not it was signed, and a verdict for the will was sustained. This would have been impossible under 1 Victoria, chapter 26, and the precise case did, in fact, in 1844, arise under that statute: *Hudson v. Parker*, 1 Rob. Ecc. 14. The proof was that the witnesses had subscribed, in presence of an ostensible testator and each other, a paper on which the writing was concealed. The testator said it was his will, but did not show any signature. After his death his proper signature appeared at the end of the paper. Dr. Lushington, in an elaborate opinion distinguishing the Victorian statute from the statute of frauds, held the paper invalid as a will.

In this situation and with the same purposes that moved the British parliament in 1837, the New Jersey legislature proceeded to deal with the general subject of wills. By an act approved March 7, 1850 (Pub. Laws 1850, p. 280), it was provided that "all last wills and testaments of persons dying after this act shall take effect shall be in writing and shall be signed or acknowledged to have been signed by the testator and declared to be his or her last will in the presence of at least two credible witnesses, present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." A year later the statute first above quoted and still extant was substituted. The main purpose of the change was to more clearly express the requirement that the signature of the testator must be made or acknowledged by him in the presence of ³³³ the witnesses, and to declare in terms that the provisions of the act should extend to personal as well as real estate. The substantial identity of much of the language used with that of the English statute of 1837 makes it indisputable that the one was the model for the other. Ours is the more stringent, if there be any difference in the forms of expression. I will not say that the interpretation of the English courts of several years' standing at the time of New Jersey's adoption of the English act should be read into our statute; it is enough to say that such interpretation is highly persuasive. The pre-

vious rendition of the Kentucky and Virginia decisions furnishes another argument in that direction. It should not be lost sight of that since 1714 our law had required wills devising lands to be signed as well as published in presence of subscribing witnesses. In that respect the new statute was an enlargement, for it permitted a signature previously made to be acknowledged by the testator.

It was suggested by the learned ordinary in the court below, in this case, that there may be a difference in the effect of the two amendatory statutes, in that the English one does, while ours does not, require the witnesses to attest as well as to subscribe the will. It being expressly provided in the English act that no form of attestation shall be necessary, it is evident that what is meant is that the witnesses shall subscribe "as witnesses," which is the concise direction of our act, accordant with the usual definition by lexicographers of the word "attest" as applied to writings.

All the later English cases approve the view of Sir Herbert Jenner-Fust. It is unnecessary to cite them. The question finally reached the house of lords in 1861, and was there definitely settled in *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, affirming *Sir Creswell Creswell*, in the new court of probate and divorce: *Charlton v. Hindmarsh*, 1 Swab. & T. 433. Briefly stated, the case was this: *Hindmarsh* produced to Dr. Wilson, a surgeon attending him in illness, a paper writing, which he then signed and said was his will, and asked the surgeon to subscribe as a witness. Dr. Wilson wrote "witness to the above will and testament, and signature," and signed his name, inadvertently ³³⁴ omitting to cross a capital "F," so that it stood as a "T." Later in the day Dr. White, the physician in regular attendance called, and there was a medical consultation. Dr. Wilson had previously told *Hindmarsh* that there ought to be another witness to the will, and, after the consultation, both doctors went into the sick-room, taking it with them. *Hindmarsh* then acknowledged his signature and Dr. White subscribed his name as a witness. Dr. Wilson, noticing that the "F" in his name lacked a cross, supplied one, and, at Dr. White's suggestion, added the date. It was held that, in order to comply with the statute, "the signature or acknowledgment of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed, or so acknowledged his signature, subscribe the will in his presence"; and that a correction of an error in a previous writing

of the name of a witness, or his acknowledgment of his signature, or the adding of a date, will not be sufficient. The lord chancellor (Campbell) and Lords Cranworth and Chelmsford gave concurring opinions, each expressing regret that the stability of the law required the court to deny effect to a meritorious disposition of property in a case where there was a plain, but abortive, attempt to comply therewith.

The American decisions defending subscription by testamentary witnesses in advance of a signing by or for the testator that have been rendered since the enactment of the New Jersey statute of 1851 rest on legislation much less restrictive than that. In *Miller v. McNeill*, 35 Pa. St. 217, 78 Am. Dec. 333, often cited, what was said on the subject was entirely gratuitous, for, under the Pennsylvania statutes, such subscription is supererogatory: *Hight v. Wilson*, 1 Dall. 94; *Rohrer v. Stehman*, 1 Watts, 463; *Frew v. Clarke*, 80 Pa. St. 170, 178. The act requires only that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; and otherwise shall be of no effect."

335 Of course, persons actually witnessing the testamentary act are not debarred from proving it by having prematurely subscribed their names to the will. In the case cited, Woodward, J., said: "Our statute contemplates, undoubtedly, a signing by testator, and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment, and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? The execution and attestation of the will were concurrent, or rather simultaneous acts, and we will not regard the question of who held the pen first, the testator or his witnesses." I have quoted this dictum because it carries its own refutation and makes strongly for the contrary decision where a statute not only "contemplates," but directs an orderly succession of acts.

The other cases are four in number, viz., *O'Brien v. Gallagher*, 25 Conn. 229; *Moale v. Cutting*, 59 Md. 510; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16;

Gibson v. Nelson, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901.

Except as to Illinois, all the statutes involved closely follow the language of the English statute of frauds; in those of Connecticut and South Carolina there being the additional requirement that the witnesses shall subscribe in the presence of each other. These cases are not helpful in interpreting our statute, and, indeed, in the South Carolina case, the learned judge rests the court's decision on the elasticity of the statutes construed. After noticing that, under 1 Victoria, chapter 26, the English courts hold that the signature, or acknowledgment of signature, of the testator must precede subscription by the witnesses, he justifies that interpretation of the act, although he thinks it a strict one, on the ground that it is such signature that the witnesses are to attest. He says that the English act clearly places more stress than that of South Carolina on the mere manner of executing wills, and he concludes: "When the statute expressly or by necessary inference requires such formalities, then nothing is left but to enforce it; but the court will not stress formalities which the statute does not." In Maryland, also, the court, in an earlier decision, declaring that, in that state, testamentary witnesses need not subscribe the will in presence of each other, ³³⁶ had called attention to the fact of the essential differences between the statute of frauds (of which it was said the Maryland act was a copy) and the Victorian statute, as pointed out by Sir Herbert Jenner-Fust.

The Illinois statute is unique. It enacts that "all wills, testaments and codicils . . . shall be reduced to writing and signed by the testator or testatrix or by some person in his or her presence, and by his or her direction and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign the said will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of such will, testament or codicil to admit the same to record; provided, that no proof of fraud." etc.

Plainly it is the will, not the signature or its acknowledgment, that is to be attested, and the supreme court of the state, in Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N.

E. 581, has held that where a testator does not sign in presence of the witnesses it is not necessary for him to acknowledge in their presence a signature previously made, the words "the same," twice occurring in the statute, in the opinion of the court, referring back to "said will"; and while, in *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 51 N. E. 901, the same court, solely on the authority of *O'Brien v. Gallagher*, 25 Conn. 229, *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97, and *Miller v. McNeil*, 35 Pa. St. 217, 78 Am. Dec. 333, did hold the order of signing immaterial, it indulged in reasoning that destroyed the force of its decision—if the statute requires attestation of signature—by declaring that "undoubtedly the proper order is for the testator to sign first, for after the witnesses had signed, he might never sign, or might sign on some other occasion, or out of their presence, which would not be a compliance with the statute."

I do not concede that the American cases were rightly decided. I very much doubt if the English courts would have so construed their basic legislation. In *Peate v. Ogley*, Comyn. 197, the verdict was justified only on the assumption that the jury found that there was execution before attestation. In *Windham v. Chetwynd*, 1 Burr. 414, 421, Lord Mansfield seems to imply such a ³³⁷ necessity, while in *Roberts v. Phillips*, 4 El. & B. 450, 459, Campbell (then lord chief justice) assumes it in upholding as valid a subscription by the witnesses at a place other than the foot of a will made in 1828. He says: "The mere requisition that the will shall be subscribed by the witnesses we think is complied with by the witnesses who saw it executed by the testator immediately signing their names on any part of it, at his request, with the intention of attesting it." In this country, the courts of five states have interpreted enactments copied from the statute of frauds as requiring signature by or for the testator before there can be subscription, in attestation, by the witnesses. In North Carolina, this occurred in 1841 (*Ragland v. Huntingdon*, 23 N. C. (1 Ired.) 561), followed in 1854 (*In re Cox's Will*, 46 N. C. (1 Jones) 321); but the first adequate treatment of the subject was in 1865, by Gray, J., in the Massachusetts supreme court, in *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687. With a wealth of erudition and argument he demonstrated, both on authority and principle, that attestation cannot precede execution of a will. The Massachusetts statute, enacted in 1836, as quoted in the report, was as follows: "No will (excepting nuncupative wills) shall be effectual to pass any estate, whether real or per-

sonal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses."

On the point in question the learned judge saw no difference between the statutes of Charles and Victoria, and he accepted the English decision culminating in *Hindmarsh v. Charlton*, 6 H. L. Cas. 160, as authoritative and coincident with the reason of the case. He assumes, indeed, as did the Kentucky court, that attestation and subscription are separate acts, but only to insist the more strongly that subscription by the witnesses, which he says is "in proof of" their attestation, must be the final act in the series essential to a valid will. No judge differing in opinion has attempted to answer the argument of Judge Gray, though several have ignored the decision as authoritative except where, as in the case decided, a necessary witness had subscribed the ³³⁸ will in the absence of the testator. In a very recent decision the supreme court of Massachusetts has adopted Judge Gray's opinion in a case directly in point, and, as compactly stated in the head-note, has held that "witnesses to a will must sign after the testator has signed": *Marshall v. Mason* (1900), 176 Mass. 216, 57 N. E. 340. *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687, was approved and followed in 1867, in Indiana, where Chief Justice Elliott says that the statute is substantially the same as 29 Charles II. chapter 3, section 5. except that the English act related only to devises and required three or four, instead of two or more, subscribing witnesses: *Reed v. Watson*, 27 Ind. 443. In Georgia, in 1869, it was held that, under a like statute, subscription of witnesses could not be vivified by acknowledgment after a signing by the testator on the following day (*Duffie v. Corridon*, 40 Ga. 122), and in 1891 it was directly held, in an opinion by Chief Justice Bleckly, that "the witnesses to a will must subscribe their names as witnesses after the will is signed by the testator—there being nothing to attest until his signature has been annexed. It makes no difference that the signing and attestation are each a part of one and the same transaction": *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712. A concise, but comprehensive, note by the reporter classifies the decisions on the general subject, including some that are merely cognate to the questions involved. The annotation to this case, as reported in 14 L. R. A. 160, may also be consulted with profit. The fifth state is Texas, where the ruling, though postulated for a

decision of the tenor of *Roberts v. Phillips* 4 El. & B. 450, is positive and unequivocal: *Fowler v. Stagner*, 55 Tex. 393.

It appears, therefore, that even under statutes not, in terms, requiring a testator's signature, but only his declared written will, to be attested, very weighty judicial opinion repudiates the idea that there can be attestation before signature. In no case has it been held that, where there is that requirement, subscription of witness can precede such signature. The only state having that statutory requirement, the courts of which have had occasion directly to deal with it, is the state of New York. There the statute, since January 1, 1830, has read as follows: ³³⁹ "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will; 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses; 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; and 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator": 2 Rev. Stats., p. 63, sec. 40.

In construing this statute, in *Vaughan v. Burford*, 3 Bradf. Surr. 78, and other decisions. Surrogate Bradford went astray. The supreme court, following him, established a will signed by the witnesses before subscription by the testator, but on the same occasion. The judgment was reversed in 1868 by the unanimous voice of the court of appeals, then exceptionally strong. The reasoning of the opinion of Woodruff, J., is so cogent, yet simple, that I will quote it. After showing the substantial identity of the New York statute with section 9 of 1 Victoria, chapter 26, and citing many of the English decisions interpreting that act, he proceeds:

"Our statute on this precise point reads: 'There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.' They are, in and by this act of signing their names, to attest, not only the signing, or acknowledgment of signing, of the testator, but his contemporaneous declaration that it is his will. Their signatures do not attest the signing by the testator if they are placed there before the will is signed by him. For

some period, longer or shorter, as the case may be, those signatures attest no execution—they certify what is not true—when and in what moment do they begin to operate as a compliance with the statute? The only reply that can be given is, when the testator signs his name. This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week or one year, and then add his signature? Certainly not, unless he summon the same persons to see him sign or hear his acknowledgment thereof. But suppose he adds his signature and dies, what then becomes of the presumption ³⁴⁰ of due execution, arising from the apparent regularity and the due form of the attestation clause? Once let it be settled that witnesses may sign before the testator and all presumption of due execution, when witnesses are dead or beyond reach, ceases. If it be said that witnesses will not sign, and so leave their names in the possession of a testator; to suppose they would, is to impeach their honesty, and it is the presumption of men's truth and honesty which makes regularity and formal attestation *prima facie* evidence of due execution. I do not think this a sufficient answer. The statute contemplates acts, each of which is serious and important. Execution and the attestation thereof bear a plain relation to each other in point of time, in the good sense and common apprehension of everyone, and the statute prescribing the requisite formalities to a valid execution and authentication plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished. I was at first inclined to think that if the whole was done at the same interview, the attestation by the signing of the witnesses might be done in any part of it, without regard to the order of events, as above suggested, the acts of the testator may be; but, upon further reflection, I am satisfied that the view taken of the subject of the ecclesiastical court in England best conforms to the language and intent of the statute. The signing or acknowledgment by the testator and his declaration that the instrument is his last will and testament are, in the statute, made contemporaneous, and neither must necessarily precede the other, and yet, in practice, this must be construed to mean on the same occasion, each as part of the same transaction, and not requiring that the words of declaration should actually accompany the movement of the pen in signing, or be actually embraced in the terms of acknowledgment of such signing. Practically which utterance is first is of no pos-

sible importance. The attestation by witnesses is of a past transaction—it is so in its nature, and so in the ordering, and, I think, the meaning of the statute. This distinction, if it served no useful purpose, if the contrary was liable to no danger, nor led to any abuse, might be deemed a too strict adherence to the literal interpretation of the law. But reasons ³¹¹ I have suggested already, I think, show that a strict adherence to the statute is demanded. Upon the ground that, according to the testimony as it appears in the case before us, the witnesses signed before the testator, the judgment of the supreme court should be reversed.”

The doctrine of this case was reaffirmed in 1876, in the case of *Sisters of Charity v. Kelly*, 67 N. Y. 409, Folger, J., saying: “It is clearly proven that the witnesses to the instrument saw no act of signing it by the deceased until after they had signed their own names to it. It is the law of this state that a subscription of a will by the testator after the witnesses have signed their names to it is not a due execution of it by him.”

It is quite plain that if the true interpretation of our statute is that the witnesses are to attest, by their subscription, the testator's signature, or acknowledgment of signature, an instant of precedence on their part will render that impossible. There is no force in the argument that, in case of an uninterrupted transaction, the orderly course of procedure is not material. The case is not one of a rule that may be relaxed, but one of interpretation of language which, in the nature of things, must be rigid. Once it is determined what the words of a statute mean, they must, under all circumstances, have that meaning. It is not permissible to hold that “follow” can ever mean “precede.” Besides, such a judicial modification of the statute—for that it must be—would be unsafe. Witnesses subscribing a will, on the faith that the testator will immediately sign it, can retain no dominion over the paper, and can in no way recall their act or advertise its abortion if the testator fails on his part. Protection, as well of the witnesses as of the testator, demands that there shall be a signature before attestation. Argument based on a loose practice with other than testamentary writings is valueless, for their validity does not depend on due attestation.

I conclude that, under our statute, it is essential to validity that everything required to be done by the testator shall precede, in point of time, the subscription of testamentary witnesses.

I shall therefore, in this case, vote for reversal and for the direction of decree denying probate to the paper writing propounded as the will of Mary Ann Caldwell.

The Order of Signing a Will by the testator and witnesses is not material, if substantially contemporaneous: *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 354, 54 N. E. 901; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Cutler v. Cutler*, 130 N. C. 1, 89 Am. St. Rep. 854, 40 S. E. 689. A different rule, however, prevails in some jurisdictions: *Marshall v. Mason*, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340.

KEMPSON v. KEMPSON.

[63 N. J. Eq. 783, 52 Atl. 360, 625.]

DIVORCE—Injunction Against.—If husband and wife have their matrimonial domicile within the state where she resides, she may there enjoin her husband from prosecuting a suit for divorce in another state, based on a false allegation of his residence in that state, and if the injunction is served on the husband personally in another state before he is brought into court by appearance, process, or publication, he is bound to obey the injunction, and is punishable for disobedience. (p. 684.)

EQUITY has no Jurisdiction to command a person to do what he has no power to do. (p. 787.)

R. Adrain, for the appellant.

A. H. Strong, for the respondent.

783 **DIXON, J.** The parties to this suit were married in 1882 and thereafter lived in this state as husband and wife until at least December, **784** 1898. On April 10, 1899, the wife, still residing in New Jersey, presented to the chancellor a bill of complaint, with affidavits annexed, in which she alleged that on March 29, 1899, her husband had commenced a suit in North Dakota asking a divorce from her on the ground of cruelty; that in his petition he had averred his residence in North Dakota for a period of three months; that such a residence was necessary to induce the court in North Dakota to take cognizance of the cause; that the husband's averment of residence was false and fraudulent, and that his residence was still in New Jersey; thereupon she prayed an injunction commanding her husband to desist and refrain from all further proceedings in the North Dakota action until the further order

of the chancellor. On April 28, 1899, an injunction, according to the prayer of the bill, was issued, and on May 31, 1899, it was served on the husband personally in the city of New York; nevertheless he proceeded with his suit in North Dakota, and on October 4, 1899, procured a decree of divorce therein. Subsequently he was attached in this state for violating the injunction, and an order was made by the chancellor adjudging him to be in contempt and directing that he be fined five dollars and costs; that he cause the decree of divorce to be set aside, and that he stand committed to the custody of the sheriff of Middlesex county until he shall have done so. From this order he now appeals.

The first question for consideration is whether the chancellor had jurisdiction of the cause in such sense as to support an injunction against the defendant, who had not been brought into court by the service of process or by appearance, and who was not within the state. If such jurisdiction did not exist, the defendant was not bound to obey the injunction (*Dodd v. Una*, 40 N. J. Eq. 672, 5 Atl. 155), but if it did, the injunction was obligatory.

It may be regarded as settled by a long train of adjudications, culminating in *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544, that the state, wherein are the matrimonial domicile and also the domicile of the complaining spouse, has the right to confer upon its courts jurisdiction over the matrimonial status, no matter where the other spouse may be. In such circumstances the matrimonial status is deemed to have a situs within the state, ⁷⁸⁵ resembling, for the time being, the situs of land, and the proceeding respecting that status is quasi in rem. This power is recognized and upheld by foreign states, provided the state exercising it has made and carried out reasonable provision for giving to the defendant notice and an opportunity to be heard: *Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071.

This authority is most frequently exercised in actions for divorce, but the principle that maintains it for dissolving the marriage status must likewise maintain it for preserving that status. To this effect is the language of Judge Cooley, in *Cooley on Constitutional Limitations*, 400, where he says: "We conceive the true rule to be that the actual bona fide residence of either husband or wife [coupled, in the present case, with the matrimonial domicile] within a state will give to that state authority to pass upon any questions affecting his or her con-

tinuance in the marriage relation." Equally broad are the expressions of Chancellor Zabriskie in *Coddington v. Coddington*, 20 N. J. Eq. 263, and of Judge Adams, speaking for this court, in *Hervey v. Hervey*, 56 N. J. Eq. 424, 39 Atl. 762, and they are fully warranted by the practice of the English courts touching all manner of matrimonial causes.

Under the laws of New Jersey jurisdiction over questions affecting the marriage relations of its citizens is vested in the court of chancery. That such jurisdiction includes the right to annul foreign judgments fraudulently obtained affecting those relations is established by the cases of *Doughty v. Doughty*, 28 N. J. Eq. 581; *Magowan v. Magowan*, 57 N. J. Eq. 322, 73 Am. St. Rep. 645, 42 Atl. 330, and *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 78 Am. St. Rep. 630, 41 Atl. 876, 43 Atl. 683. If the court has power to annul such decrees for fraud, it must also, on a general principle of equity, be able to enjoin parties from attempting to obtain such decrees by fraud.

But it is argued that the jurisdiction of the court is not complete until certain steps have been taken to give the defendant notice of the suit. Undoubtedly this is true; for even the state's authority is dependent upon some reasonable provision being made to that end; and the state has made the jurisdiction of the court dependent on compliance with certain prescribed regulations. For the purpose of pronouncing a decree in the cause ⁷⁸⁶ there must be appearance by the defendant, or process served upon him within the state, or publication of notice to him: *Hervey v. Hervey*, 56 N. J. Eq. 424, 39 Atl. 762. But for the purpose of giving effect to a preliminary injunction, nothing more is needed than that the defendant should have received due notice of the injunction: *Haring v. Kauffman*, 43 N. J. Eq. 397, 78 Am. Dec. 102; *Cape May etc. R. R. Co. v. Johnson*, 35 N. J. Eq. 422. In the *Haring* case, as in the present case, the injunction was served on the defendant outside of this state and he had not yet been brought into court by appearance, process or publication, but it was held that the injunction was obligatory upon him.

We do not mean to say that in every case the service of an injunction outside of the state will bind the party to obedience. Such a rule would compel foreign residents to enter into litigation here whenever an injunction could be secured. Whether an injunction served beyond the borders of the state upon an individual not personally under the jurisdiction of the court will bind him, depends on the nature of the suit. If the

suit be one in which the court can acquire no right to render a binding decree against an absent defendant; then its injunction, preliminary or subsequent to decree, cannot bind him. Thus, if a bill were filed here to compel a resident of New York to refrain from negotiating a bill of exchange obtained by fraud, an injunction to that effect served on the defendant in New York would be unavailing. But if the subject of the suit were a fraudulent deed of land in New Jersey, an injunction so served would be binding, because the absence of the defendant would not affect the power of the court to settle the title to the land by a decree in the cause. Such was the object of the bill in *Haring v. Kauffman*, 13 N. J. Eq. 397, 78 Am. Dec. 102.

In the case now before us, the matrimonial domicile and the domicile of the complainant being actually within the state when the bill was filed, the court had the right to proceed to final decree against the defendant, even though he remained absent from the state, and therefore to require his obedience to the injunction, of which he had notice.

Regarding the alleged waiver of the injunction by the complainant, we desire to add nothing to the opinion of the learned vice-chancellor.

⁷⁸⁷ The only other question open for consideration on this appeal is as to the propriety of the remedial portion of the order: *Grand Lodge v. Jansen*, 62 N. J. Eq. 737, 48 Atl. 426. It requires the defendant to cause the decree of the North Dakota court to be set aside.

We think that decree should be set aside, but evidently the defendant has not the power to ensure this result; only the court that rendered the decree can vacate it. True, if a party be commanded by the court to do a certain thing and afterward he satisfies the court that he has not the power to do it, the court will ordinarily relieve him from the order. But when it appears at the outset that the thing to be done is not within the control of the party to be enjoined, but yet that his effort may induce its accomplishment, a more reasonable course for the court is to require the effort, not the result.

We therefore think this part of the order should be modified, so as to require the defendant to present the truth to the court in North Dakota and in good faith to urge that its decree be set aside. When that is shown to have been done and the fine and costs have been paid, the defendant should be released.

Mr. Justice Garrison Dissented, upon the ground that the court had no power to render a personal judgment against a defendant without acquisition of jurisdiction over his person. This, he maintained, was what was in fact done in the principal case.

An Injunction will issue, in a proper case, against persons within the jurisdiction of the court to restrain them from resorting to the courts of another state: See *Miller v. Gittings*, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372; *Kendall v. McClure Coke Co.*, 182 Pa. St. 1, 61 Am. St. Rep. 688, 37 Atl. 823; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046; monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 879-885.

GIFFORD v. McGUINNESS.

[63 N. J. Eq. 834, 53 Atl. 87.]

EXECUTIONS—Jurisdiction to Compel Payment of Money into Court.—The court has jurisdiction to compel money raised by execution issued by it and naming the payee to be brought into court for distribution, and from an order made for that purpose no one suffers an appealable grievance. Such order may be obtained without written pleading or proof upon notice to the interested parties. (p. 688.)

Decree by confession on the foreclosure of a mortgage on the lands of T. McGuinness, adjudging a certain amount due to the complainants, the mortgagees, and a certain amount due to one T. F. McLaughlin, as a judgment creditor of McGuinness, and ordering a sale of the mortgaged lands to pay costs and such debts, the surplus, if any, to be brought into court. Execution thereafter issued on the judgment commanding sale and the payment of the sums adjudged to the parties above named, and directing the sheriff to have such money in court at a certain time to render to such persons, together with any surplus. At the execution sale the land was struck off to McLaughlin on conditions requiring the payment of ten per cent of the purchase money down, and the remainder on a day named. Pending the making of title to McLaughlin, the defendant, Mary E. McGuinness, wife of said T. McGuinness, presented a petition to the court setting forth that she had an inchoate right of dower in the land sold, and that after the decree of foreclosure she had procured against her husband a decree for alimony and counsel fees; and to enforce it, a writ of sequestration of his personal property and the rents of his real estate. Also that

McLaughlin's judgment was collusive, and on a fictitious debt of her husband to defeat her rights, and that he was the real purchaser at the sale. Under this petition an order was made directing a master to ascertain the truth of her allegations, and directing the sheriff to pay into court all of the proceeds of the sale above the amount due the mortgagees. McLaughlin applied for a discharge or modification of such order. This was denied and he appealed.

J. J. Hubbell, for the appellant.

M. W. Van Winkle, for the respondent.

⁸³⁵ COLLINS, J. So far as payment into court is concerned, the order appealed from was entirely discretionary with the chancellor, and is not subject to review. Originally, under an execution of the tenor of that under which the sale was made, framed, as it was, on the common-law fieri facias, payment could only be made publicly in court by the sheriff or other officer executing the writ. A relaxation of this strictness, permitting payment out of court and the acceptance, in lieu of cash, of the receipt of the party entitled to payment under the judgment or decree—which became almost a matter of course where such party was the purchaser—led to the contention that neither the officer nor the court could adopt any other course. This contention was effectually disposed of by Chief Justice Hornblower, in the supreme ⁸³⁶ court, in 1833: *Stebbins v. Walker*, 14 N. J. L. 90, 25 Am. Dec. 499. The chief justice, after a historical review of the subject, said: "I cannot doubt that we have the right, whenever application is made to us for that purpose and a proper case stated, to compel the sheriff to bring the money into court. Neither have I any doubt but that the sheriff, whenever he chooses for his own convenience, instead of paying the money to the party out of court, may, in obedience to the command of the writ, bring it here and pay it in court." This case, also, is authority for the right of the sheriff to discharge himself by taking the receipt of the clerk; a fortiori this is his only permissible course where payment into court is ordered.

The practice thus declared has never since been questioned. It was reasserted as proper in *Cox v. Marlatt*, 36 N. J. L. 390, 13 Am. Rep. 454, and in *Wandling v. Thompson*, 47 N. J. L. 142, the supreme court held in contempt a sheriff who, after an order to pay into court the proceeds of an execution, gave

a deed for land sold by him to a plaintiff in execution and accepted his receipt in lieu of cash. We entirely assent to the view that any court may compel money raised by its process to be brought into court for distribution, and that from an order made for that purpose no one suffers an appealable grievance. To obtain an order merely for such payment neither written pleading nor proof is essential. The court is merely enforcing a regulation customarily dispensed with. Presumably the money will be paid as previously adjudged. The only burden will be that of notice to interested parties.

Chancellor Green well held, in *Lithauer v. Royle*, 17 N. J. Eq. 40, that no change can be made in the mode of appropriating a fund ordered raised by decree, except by opening and correcting the decree and altering the execution. The same thing is, of course, true of a common-law judgment.

The proceeding to correct the adjudication may, of course, be instituted before the money is ordered paid into court, and a very proper course is that which was taken in the present case—namely, to include prayer for that relief in the application for the order for such payment.

The only debatable question on this appeal is whether Mrs. **837** McGuinness made a case sufficient to warrant the inquiry ordered. She certainly was not estopped from asking it, for, at the time she presented her petition, she had a larger right than at the time she suffered the decree. The issue she now tenders has never been litigated, and she has a right to be heard on it. The records of the court afforded sufficient proof of her status. It may be that the chancellor might well have required a disclosure of the information forming the ground of her belief that McLaughlin's judgment was collusive and fraudulent; but there was no substantial grievance inflicted in permitting the inquiry ordered without first requiring *prima facie* proof of the allegations made.

The order appealed from is, in all things, affirmed.

Executions.—The court may, in a proper case, compel the sheriff to bring money into court which he has raised on execution, and when brought in may determine conflicting claims thereto: *Stebbins v. Walker*, 2 Green (N. J.), 90, 25 Am. Dec. 499. But a sheriff holding money made on execution from another court cannot be directed by this court to bring it in for distribution: *Jones v. Jones*, 1 Bland (Md.), 443, 18 Am. Dec. 327.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

MATTER OF GORDEN.

[172 N. Y. 25, 64 N. E. 753.]

DOWER, Wills Barring.—When a testator devises his real property to trustees until his youngest child becomes of age, and directs that one-third of the net income be paid to the widow and the balance expended for the support and education of his children, and upon the expiration of the trust one-third to be conveyed to the widow during her life or widowhood, and the residue to his children, and authorizes the trustees to sell the real estate and invest the proceeds, there is a manifest incompatibility between the provisions of the will and a claim for dower. (p. 693.)

William Gorden, by his will, made some minor bequests, and gave certain personal property to his wife. All the rest of his estate, both real and personal, he gave to his executors in trust to collect the rents and profits, pay the expenses and keep the buildings in repair and insured, until his youngest child should become of age. He directed the trustees to pay one-third of the net income to his widow, and to pay and apply in their discretion the other two-thirds to the support and education of his children, limiting the annual expenditure in respect to an incompetent daughter to five hundred dollars. Upon the termination of the trust he required the trustees to retain one-third of the corpus of the estate for his widow's use during her life or widowhood. The remaining two-thirds he directed to be conveyed to his children, except that the trustees were required to set aside an amount sufficient to secure the payment of an annuity of not more than five hundred dollars for the incompetent child. He gave the trustees full power to mortgage and convey the property, and directed the manner of investment of the proceeds of any sale.

William P. Pickett and Edward L. Somerville, for the appellants.

George W. McKenzie and George P. Beebe, for the respondent.

28 VANN, J. The only question argued before us is whether the widow of the testator is entitled to the provision made for her by her husband in his will in addition to dower in his real estate. If she was put to her election, she made it by commencing an action for the admeasurement of her dower: Laws 1896, c. 546, sec. 180; 2 Scribner on Dower, 2d ed., 511.

While dower is favored by the law, the right to both dower and the benefit of a testamentary provision must yield to the intention of the testator when expressly stated or clearly implied. If there is reasonable doubt the widow takes both, but when the intent to limit is clear she is put to her election. This intent must appear from the will itself, read in the light **29** of existing facts. "The claim of dower," said Chancellor Kent, "must be inconsistent with the will and repugnant to its dispositions, or some of them": *Adsit v. Adsit*, 2 Johns. Ch. 448, 451, 7 Am. Dec. 539.

The language of learned judges in laying down the rule upon the subject varies somewhat in form, and for convenience in making comparison, we repeat it, as stated in the leading cases in this court. It was laid down in an early case as follows: "Where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is, whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds": *Lewis v. Smith*, 9 N. Y. 502, 511, 61 Am. Dec. 706.

The next time the subject was before the court it was held that the wife is not put to her election, "unless it clearly appears from the will that the provision made for her was intended as a substitute for that to which she is entitled by law. The intention need not be declared in express words. It may be implied, if the claim of dower would be plainly inconsistent with the will": *Savage v. Burnham*, 17 N. Y. 561, 577.

In *Tobias v. Ketchum*, 32 N. Y. 319, 324, the test given is that the devise of the will "be so repugnant to the claim of dower that they cannot stand together."

In *Vernon v. Vernon*, 53 N. Y. 357, 361, it was declared that dower is not barred "unless the claim of dower is inconsistent with some other disposition of or arrangement made by the testator in respect to his property, thereby showing an intention to substitute the testamentary gift for the provision which the law makes for her." The court then repeated with apparent approval the following declaration of Lord Redesdale, in *Birmingham v. Kirwan*, 2 Schoales & L. 452: "The result of all of the cases of implied intention seems to be that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds."

³⁰ In *Matter of Zahrt*, 94 N. Y. 605, 609, the court adopted the rule as laid down by Lord Redesdale, *ipsissimis verbis*.

In *Konvalinka v. Schlegel*, 104 N. Y. 125, 129, 58 Am. Rep. 494, 9 N. E. 868, language was used which seems to have produced confusion in the minds of the learned judges below. We then said that in the absence of express words, "there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. . . . We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will." This is simply a restatement of the old rule in somewhat different language, as appears in *Asche v. Asche*, 113 N. Y. 232, 235, 21 N. E. 70, where it was declared that dower is excluded when "there is a manifest incompatibility between such provision and dower," and the *Konvalinka* case is cited among others to support the principle. This is the latest utterance by the court upon the subject to which our attention has been called.

We do not think that the rule has been extended or essentially varied during the past fifty years, for a manifest incompatibility must exist whenever the will contains provisions so inconsistent with the right of dower that if the widow had the benefit of both, it would defeat the intention of the testator. The question now before us, therefore, is whether there is a manifest incompatibility between the provisions of Mr. Gordon's will and the claim of dower by his widow. Where

a valid trust is created covering all the real estate of the testator we have always held it to be inconsistent with the right of the widow to manage or control any part of the realty. Thus in *Savage v. Burnham*, 17 N. Y. 577, it was said: "In this case the testator devised and bequeathed all his estate, real and personal, to ³¹ trustee, the real estate upon trust to sell after the death of his wife. During her life she was to have one-third of the clear rents and profits, and the other two-thirds were to go into the general trust fund for distribution. The entire estate, with all its income, except the one-third of the rents and profits of the land, is given, in the clearest possible terms, to the testator's children and the children of his daughters. It is, therefore, impossible for her to receive any part of it, except what is there expressly given to her, without subverting the will to that extent. If no provision had been made for her, she would have been entitled to have one-third of the real estate set off to her during life, and in this she would have held the legal estate. Inconsistently with this, the will gives the legal estate in all the lands to trustees, and directs that she shall have one-third of the rents: the other two-thirds to go into a personal fund for distribution. A claim of dower in the same lands cannot stand with these provisions, and we must, therefore, hold that the widow was bound to elect whether she would take her dower or the provision in her favor made by the will."

• In *Tobias v. Ketchum*, 32 N. Y. 319, the testator empowered his executors to rent, lease, repair and insure his real estate, until sold or divided, and out of the rents and profits to pay the provision made for the widow, and it was held a devise to them of the legal estate in trust and inconsistent with the claim of dower therein. The widow was accordingly put to her election.

In *Vernon v. Vernon*, 53 N. Y. 362, the same learned judge who wrote the opinion in the *Konvalinka* case said: "The testator devised to his wife in fee a portion of the lands of which she was dowable. He devised all his remaining lands (except his reversionary interest in Scotland House) to trustees charged with the payment to her of an annuity for life out of the rents and profits, to pay which requires more than the income from the property; and he declares that the annuity is given to her for her maintenance and the education and maintenance of her children. It is not necessary in this case to decide ³² whether

these circumstances conjoined show the 'manifest intent' requisite to bar the widow of her dower. . . . The provision that the executors may sell the stores at a price fixed by him in the will, or take a conveyance from his brother Thomas, of the moiety owned by him, at the same price in the adjustment of the testator's interest in the firm of Vernon Brothers & Co., clearly indicates that the power intended to be given by the testator to his executors was a power to transfer, in case of sale, the whole title free from any claim of dower. This provision is inconsistent with the widow's claim of dower, and she was put to her election."

In the Zahrt case the obligation to keep the buildings and personal property insured and pay all taxes and keep the estate in good repair was held inconsistent with the assertion of a dower right.

In the Konvalinka case the widow was not put to her election because the devise to the executors was void as a trust, although valid as a power in trust, and the lands vested in the heirs subject to the execution of the power. The trustees had neither title nor control. It was declared that the execution of the power was not inconsistent with the dower interest as a sale could be made subject thereto. There was no disposition of the income, and this feature was relied upon to distinguish the case from *Savage v. Burnham*, 17 N. Y. 561, and *Tobias v. Ketchum*, 32 N. Y. 319.

While a mere power of sale, to be promptly exercised for the purpose of distribution, does not put the widow to her election, the vesting of title in trustees not only with power to sell and reinvest, but with special directions as to control and management and the payment over of the annual income to the widow and children, during the term of the trust, we regard as sufficient. Thus, in the latest case decided by us, we held that the creation of a trust and the vesting of title to the realty in trustees was inconsistent with an implied right upon the part of the widow to manage and control any part of the estate: *Asche v. Asche*, 113 N. Y. 232, 21 N. E. 70. When a testator³³ devises all his real property, constituting the bulk of his estate, to trustees until his youngest child, about one year old, shall become of age and directs that one-third of the net income, after paying expenses, including insurance and repairs, be paid to the widow and the other two-thirds expended for the support and education of his children, and, upon the expiration of the trust, one-third to be conveyed to the widow during her life or widowhood, and the other two-

thirds to his children, there is a manifest incompatibility between the provisions of the will and a claim of dower. By allowing the latter the scheme of the will would be defeated, for that intrusts the control and management of the entire estate to trustees, while the right to dower carries with it the control and management of one-third of the realty during the life of the dowager.

The right to mortgage and to sell and reinvest, as given by the will before us, is inconsistent with the claim of dower. The trustees were authorized to sell all the real estate of which the testator died "seised and possessed," and to reinvest the proceeds "in such other real estate or profitable securities as to them shall seem proper for the preservation of said estate and the carrying into effect of the trusts herein created." He thus necessarily contemplated the conveyance of the entire title and the keeping together of the whole estate for the benefit of the trust. As was said in the *Asche* case: "The absolute power of sale conferred upon the executors was evidently not intended to be limited or impaired by an inability on their part to convey a good title to the whole of such real estate, and the purposes of the will required such sale to be made unhampered by obstructions which might be interposed by conflicting interests in the property" (p. 235): See, also, *Le Fevre v. Toole*, 84 N. Y. 95.

Furthermore, the direction "to keep the real estate in repair and to insure against loss by fire," manifestly meant the entire estate, not two-thirds thereof, for no division in the management, possession or control was in contemplation. As we said in ³⁴ *Tobias v. Ketchum*, 32 N. Y. 319, of the widow there, so we may say of the widow here, that "her claim of dower, if allowed, would inevitably defeat the scheme of the will, for it would prevent the trustees from holding the legal title of the whole estate and receiving the entire rents and profits for the purpose of paying assessments, interest, repairs and insurance and ascertaining the net income, of which one-third is to be paid to the widow and the residue ultimately to the other beneficiaries" (p. 327). Then again, the limitation by the testator of the expenditure for the benefit of his unfortunate child to a sum not exceeding five hundred dollars, indicates that he expected and intended that her proportion of the income should be at least that sum, which could hardly be the case if the claim of dower is sustained.

In our opinion it is manifest from the carefully devised plan to invest the trustees with the continuous management of all the real estate for a long term of years, that the testator did not intend that one-third of his estate should be placed in the possession and under the control of the widow, and at the same time that she should receive one-third of the income derived from the two-thirds then remaining. He did not intend that five-ninths of the income should go to her, while only one twenty-seventh went to each of his twelve children. Such a construction would be in contradiction of the will and would disappoint the intention of the testator. We think that the dispositions of the will cannot "be fulfilled consistently with the operation of the claim of dower," and, therefore, so much of the order of the appellate division and the decree of the surrogate as in effect allowed the widow one-third of the rents and profits of the estate should be reversed and the proceedings remitted to the surrogate with instructions to modify and re-adjust his decree accordingly, with one bill of costs to the appellants against the respondent in all courts.

Parker, C. J., and Gray, O'Brien, Haight, Cullen and Werner, JJ., concur.

Ordered accordingly.

WHEN A WIDOW IS BY A WILL REQUIRED TO ELECT BETWEEN ITS BENEFITS AND HER RIGHT TO DOWER OR IN THE COMMUNITY PROPERTY.

I. General Common-law Doctrine.

II. Effect of Particular Testamentary Provisions.

- a. Devise of Life Estate.
- b. Devise During Widowhood.
- c. Provision for Support of Widow—Annuity and Income.
- d. Devise to Trustees to Sell.
- e. Provision for a Division Between Widow and Children.
- f. Other Devises and Bequests.

III. Statutory Enactments.

- a. Their Effect on the Common-law Doctrine.
- b. Conflict of Laws.

IV. Community Property.

I. General Common-law Doctrine.

Every married woman has an interest in the lands of her husband. Of this she cannot be divested but by her own act or consent. If he makes a provision for her by his will, she has her election to take

the testamentary provision or to claim her legal provision. If the provision in the will is an ordinary bequest or devise, and is not expressed to be in lieu of dower, she is entitled to take under the will and also claim the estate the law gives her. But while a husband has no direct control of his wife's right to dower, he may offer her, by testamentary gift, something in place of it, and thereby put her to an election. In this event she cannot have both, and her acceptance of the gift bars her dower. However, a testamentary provision, when accepted by her, does not defeat her right to dower, unless the intention of the testator that the provision shall be in lieu of dower is shown by a declaration of the will to that effect, or is clearly deducible from its terms. The presumption is that a devise or bequest is in addition to, and not a substitute for, dower: *Hilliard v. Binford*, 10 Ala. 977; *Thompson v. Betts*, 74 Conn. 576, ante, p. 235, 51 Atl. 564; *Kinsey v. Woodward*, 3 Harr. (Del.) 474; *Warren v. Morris*, 4 Del. Ch. 289, 300; *Tooke v. Hardeman*, 7 Ga. 20; *Speer v. Speer*, 67 Ga. 748, 752; *Cain v. Cain*, 23 Iowa, 31; *In re Estate of Blaney*, 73 Iowa, 113, 34 N. W. 768; *Franke v. Wiegand*, 97 Iowa, 704, 66 N. W. 918; *Shaw v. Shaw*, 2 Dana (Ky.), 341; *Timberlake v. Parish*, 5 Dana (Ky.), 346; *Bailey v. Duncan*, 4 T. B. Mon. (Ky.) 256; *Bayes v. Hawes*, 24 Ky. Law Rep. 281, 68 S. W. 449; *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *McGowen v. Baldwin*, 46 Minn. 477, 49 N. W. 251; *Wilson v. Cox*, 49 Miss. 538; *Brown v. Brown*, 55 N. H. 106; *Godman v. Converse*, 43 Neb. 463, 61 N. W. 756; *Norris v. Clark*, 10 N. J. Eq. 51; *Church v. Bull*, 2 Denio, 430, 43 Am. Dec. 754; *Bull v. Church*, 5 Hill, 206; *Fuller v. Yates*, 8 Paige, 325; *Matter of Accounting of Frazier*, 92 N. Y. 239; *Evans v. Webb*, 1 Yeates (Pa.), 424, 1 Am. Dec. 308; *Borland v. Nichols*, 12 Pa. St. 38, 51 Am. Dec. 576; *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573; *Durfee, Petitioner*, 14 R. I. 47; *Braxton v. Freeman*, 6 Rich. (S. C.) 35, 57 Am. Dec. 775; *Hall v. Hall*, 8 Rich. (S. C.) 64 Am. Dec. 758; *Jarman v. Jarman*, 4 Lea (Tenn.), 671; *Wiseley v. Findlay*, 3 Rand. (Va.) 361, 15 Am. Dec. 712; *Higginbotham v. Cornwell*, 8 Gratt. (Va.) 83, 56 Am. Dec. 130; *Nelson v. Kownslar*, 79 Va. 468; *French v. Davies*, 2 Ves. 572; *Ellis v. Lewis*, 3 Hare, 310.

"It is a maxim in a court of equity," said Chief Justice Marshall, in *Herbert v. Wren*, 7 Cranch, 370, 377, "not to permit the same person to hold under and against a will. If, therefore, it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it, if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefits she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both."

An express provision in a will in lieu of dower puts the widow to her election, and if accepted with a proper understanding of her position, bars the estate which the law gives her: *Collins v. Wood*, 63 Ill. 285; *Knighton v. Young*, 22 Md. 359, 373; In the Matter of *Vowers*, 113 N. Y. 569, 21 N. E. 690; *Lee v. Tower*, 124 N. Y. 376, 26 N. E. 943; *Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355; *Chapin v. Hill*, 1 R. I. 446; *Johnson v. Johnson*, 44 S. C. 364, 22 S. E. 417. The same result may be effected, however, by implication. Where the provisions of the will manifest a clear and unequivocal intention on the part of the testator to bar his wife's dower, this is sufficient, without express words, to put her to her election. An implied intention may be deduced by showing that the claim of dower is inconsistent with the will and repugnant to its dispositions, or some of them, or that to allow dower would disturb, disappoint, or defeat the plain purpose of the testator, as shown by the whole will. The intention of the testator is the guide, and no particular form of words or technical terms are necessary to the expression of such intention. *Helm v. Leggett*, 66 Ark. 23, 48 S. W. 675; *Lord v. Lord*, 23 Conn. 327; *Alling v. Chatfield*, 42 Conn. 276; *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Stephens v. Gibbes*, 14 Fla. 331; *Hurley v. McIver*, 119 Ind. 53, 21 N. E. 325; *Snyder v. Miller*, 67 Iowa, 261, 25 N. W. 240; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; *White v. White*, 1 Harr. (N. J.) 202, 31 Am. Dec. 232; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Brokaw v. Brokaw*, 41 N. J. Eq. 304; *Savage v. Burnham*, 17 N. Y. 561; *Vernon v. Vernon*, 53 N. Y. 351; *Matter of Estate of Smith*, 30 N. Y. Supp. 982, 10 Misc. Rep. 320; *Koezly v. Koezly*, 65 N. Y. Supp. 613, 31 Misc. Rep. 397; *Pickett v. Peag*, 3 Brev. (S. C.) 544, 6 Am. Dec. 594; *Bamister v. Bamister*, 37 S. C. 529, 16 S. E. 612; *Hair v. Goldsmith*, 22 S. C. 566; *Callahan v. Robinson*, 30 S. C. 249, 9 S. E. 120; *Ruthford v. Mayo*, 76 Va. 117; *Atkinson v. Sutton*, 23 W. Va. 197; *Lawrence v. Lawrence*, 2 Vern. 365; *Strahan v. Sutton*, 3 Ves. 249; *Chalmers v. Storil*, 2 Ves. & B. 222; *Parker v. Sowerby*, 4 De Gex, M. & G. 321.

But to bar her of dower by implication, the provisions of the will, or some of them, must be absolutely inconsistent with the claim of dower, so that the testator's intention will be defeated as to some part of the property devised or bequeathed to others, if she takes her dower, together with the testamentary provision. And to deprive the widow of dower, or to compel her to elect, it is not sufficient that the provisions of the will render it doubtful whether the testator intended she should have her dower in addition to the testamentary bounty, but the provisions of the will must be such as to show an evident intention on the testator's part to exclude the claim of dower: *Sanford v. Jackson*, 10 Paige, 266. It is not enough to say that upon the whole will it fairly may be inferred that the testator intended his widow should have no dower. To compel

her to elect, the court must be satisfied that there is a positive intention that she is to be excluded from dower: *Mills v. Mills*, 28 Barb. 454. In the absence of an express declaration in the will that the provision therein is in lieu of dower, "mere intention of the testator to that effect, gathered from the will, is not enough to put the widow to an election. To make a case for election, he [Mr. Pomeroy] says 'that intention must have been shown or carried into operation by totally inconsistent gifts of the land subject to dower'": *Stokes v. Pillow*, 64 Ark. 1, 40 S. W. 580, citing 1 Pomeroy's Equity Jurisprudence, sec. 493; *Adsit v. Adsit*, 2 Johns Ch. 448, 7 Am. Dec. 539, and other cases.

She will not be made to elect between her dower and the testamentary provision unless the implication to that effect is clear and manifest: *Bennett v. Packer*, 70 Conn. 357, 66 Am. St. Rep. 112, 39 Atl. 739; *In re Klostermann*, 6 Mo. App. 314; *Leonard v. Steele*, 4 Barb. 20; or is clearly deducible from the terms of the will: *In re Estate of Franke*, 97 Iowa, 704, 66 N. W. 918; or is unequivocally expressed: *Hasenritter v. Hasenritter*, 77 Mo. 162; *Sheldon v. Bliss*, 8 N. Y. 31. She is not put to her election unless the provisions of the will and her claim of dower are plainly or totally inconsistent: *Thompson v. Betts*, 74 Conn. 576, 92 Am. St. Rep. 235, 51 Atl. 564; *Lasher v. Lasher*, 13 Barb. 106. The inconsistency must be such as to disturb, defeat, interrupt, or disappoint some provision of the will: *Hunter v. Hunter*, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656. She need not elect unless it is beyond reasonable doubt that the assertion of her dower right would prevent the giving full effect to the testator's intention: *Dixon v. McCue*, 14 Gratt. 540. The conclusion should be as satisfactory as if it were expressed: *Douglas v. Feay*, 1 W. Va. 26. The test is, whether the provision of the will and the claim of dower are so manifestly repugnant that they cannot stand together: *Sumerel v. Sumerel*, 34 S. C. 85, 12 S. E. 932.

It thus appears how high in the esteem of courts dower stands, and how reluctant they are to put the widow to an election between it and a testamentary gift. In the words of Justice Andrews: "Dower is favored. It is never excluded by a provision for a wife, except by express words or necessary implication. Where there are no express words, there must be, upon the face of the will, a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator, as manifested by his will. The intention of the testator cannot be inferred from the extent of the provision, or because she is a devisee under the will for life, or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement, or

even because it may be inferred, or believed, in view of all the circumstances, that if the intention of the testator had been drawn to the subject, he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will": *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868. To the same effect, see *Glaser v. Glaser*, 74 N. Y. Supp. 395, 67 App. Div. 132.

II. Effect of Particular Testamentary Provisions.

a. **Devise of Life Estate.**—A devise by a testator of all his property to his wife for life is not inconsistent or incompatible with her claim of dower, and does not put her to an election unless given in lieu of dower, either expressly or by necessary implication: *Potter v. Worley*, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; *Daugherty v. Daugherty*, 69 Iowa, 677, 29 N. W. 778; *Hunter v. Hunter*, 95 Iowa, 728, 58 Am. St. Rep. 455, 64 N. W. 656; *Howard v. Watson*, 76 Iowa, 229, 41 N. W. 45; *In re Estate of Proctor*, 103 Iowa, 232, 72 N. W. 516; *Purdy v. Purdy*, 46 N. Y. Supp. 215, 18 App. Div. 310; *Hopkins v. Cameron*, 70 N. Y. Supp. 1027, 34 Misc. Rep. 688. The will may provide for a remainder over to, or for a division of the estate among, others on the death of the widow: See *Sutherland v. Sutherland*, 102 Iowa, 535, 63 Am. St. Rep. 477, 71 N. W. 424; *Bare v. Bare*, 91 Iowa, 143, 59 N. W. 20; *Watson v. Watson*, 98 Iowa, 132, 67 N. W. 83. "The devise to the plaintiff for life," observes Justice Denio in *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706, "of all the testator's real and personal property, would seem, on a superficial view, to be inconsistent with the right of dower; and it would be clearly so if she was dowerable only of the lands of which her husband died seised, after all liens and encumbrances thereon had been satisfied. But as her interest as dowress extends to all the lands of which he was seised during coverture, and is not subject to his debts nor to any liens which he may have created without her joining in them, it is obvious that such a provision would, in many cases, be quite illusory as a compensation for dower." The rule that a devise to a wife of a life estate in all the testator's property, in the absence of any restrictive words, is not to be treated as in lieu of dower, is changed by statute in Iowa: *Percifield v. Aumick*, 116 Iowa, 383, 89 N. W. 1101.

A devise of a portion of the testator's estate to his widow for life, and a devise of the residue to third persons, does not make a case for election between the benefits of the will and the right to dower in such residue: *Havens v. Havens*, 1 Sand. Ch. (N. Y.) 324; *Mills v. Mills*, 28 Barb. 454. In Illinois, however, the acceptance by a widow of a devise of a life estate in certain lands bars her dower in lands otherwise devised: *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267. It has been held that where certain lands are devised

to a widow she cannot be endowed of the same lands: *Cunningham v. Shannon*, 4 Rich. Eq. (S. C.) 135. Though it seems in Iowa a devise of specific lands does not preclude a claim of dower in them in addition to the life estate: *Parker v. Hayden*, 84 Iowa, 493, 51 N. W. 248.

b. Devise During Widowhood.—In case of a devise to a widow for life or during her widowhood, the authorities are conflicting as to whether she may claim dower in the same lands devised. Some authorities hold that there is no inconsistency between the benefits of the will and the estate conferred by law, and she is not forced to elect between them: See *Church v. Bull*, 2 Denio, 430, 43 Am. Dec. 754; *Sanford v. Jackson*, 10 Paige, 266. Other authorities announce a contrary doctrine: See *Stark v. Hunton*, 1 N. J. Eq. 216; *Cooper v. Cooper*, 56 N. J. Eq. 48, 38 Atl. 198; *Hamilton v. Buckwalter*, 2 Yeates (Pa.), 389, 1 Am. Dec. 350. In *Schwatken v. Daudt*, 53 Mo. App. 1, it is held that a devise of all the testator's property to his wife during her widowhood is inconsistent with her claim to dower in the personal property.

c. Provision for Support of Widow—Annuity and Income.—A gift of one-third of the income of the testator's real estate to his widow for life does not put her to an election between the gift and her dower: *Dunklee v. Butler*, 56 N. Y. Supp. 329, 25 Misc. Rep. 680; nor does a direction to the executors to apply a certain annual sum from the income of the estate for the support of the widow: *Matter of Grotrian*, 71 N. Y. Supp. 842, 35 Misc. Rep. 257. A direction to set apart a certain sum out of the estate, the interest thereon to be paid annually to the widow, does not bar her dower, though the will also directs the sale of both real and personal property: *Candler v. Woodward*, 3 Harr. (Del.) 428. See, also, *Kimbel v. Kimbel*, 43 N. Y. Supp. 900, 14 App. Div. 570. A widow is not required to elect between her dower and an annuity which is made a charge on real estate devised to others and is made payable to her for life: *Horstmann v. Flege*, 172 N. Y. 381, 65 N. E. 202. Compare *Worthen v. Pearson*, 33 Ga. 385, 81 Am. Dec. 213. Where a will makes no provision for the wife, but the codicil makes the entire estate chargeable for her support during life, she is not forced to elect: *Bentley v. Bentley*, 112 Iowa, 625, 84 N. W. 676. And if a testator, on devising land to each of his two nephews, provides that one of them shall keep his entire property together and support his widow out of the proceeds, and also gives his wife all cash on hand at his death, she is not barred of dower in the land: *Hiers v. Gooding*, 43 S. C. 428, 21 S. E. 310.

If the provisions of a will demonstrate that it was not the intention of the testator to give both an annuity and dower to his widow, she must elect between them: *Dodge v. Dodge*, 31 Barb. 413. An annuity which was made a charge on the entire estate, real and personal, is a bar to dower, where it would defeat the keeping of the

entire estate together as directed by the will: *Speer v. Speer*, 67 Ga. 748; where a testator bequeaths to his wife one room in his dwelling-house and a comfortable maintenance out of his real estate for her during her life or widowhood, and then devises all his real estate to his two sons to be divided equally between them, the bequest to his wife will be regarded as in lieu of dower: *White v. White*, 1 Harr. (N. J.) 202, 31 Am. Dec. 232. And in *Campbell v. Sankey*, 114 Iowa, 69, 86 N. W. 48, it is held that a devise of all the property of the testator to his son for the purpose of supporting his widow is inconsistent with her claim of dower. Where, by the terms of a will, a widow takes about two-thirds of the income of the personal estate and the use of nearly one-half the real estate, this excludes dower: *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45.

d. **Devise to Trustees to Sell.**—In *Gordon v. Stevens*, 2 Hill Ch. 46, 27 Am. Dec. 445, it is said a devise of lands to trustees to sell is understood to pass the real estate subject to dower. And accordingly it is held in *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868, that where a testator willed his residuary estate, consisting of both real and personal property, to his executors to sell and divide the proceeds equally between his wife and children, share and share alike, the widow takes dower in addition. And a widow is not put to her election where the testator devises all his property to trustees with a peremptory power of sale, and directs the payment to her of an annuity out of the converted fund: *Wood v. Wood*, 5 Paige, 596, 28 Am. Dec. 451. But see *Young v. Boyd*, 60 How Pr. 213; *Brink v. Layton*, 2 Redf. (N. Y.) 79; *Savage v. Burnham*, 17 N. Y. 561. However, in *Cooper v. Cooper*, 56 N. J. Eq. 48, 38 Atl. 198, Vice-Chancellor Pitney says that "some of the older English cases, and perhaps a few in this country, have held a direction to executors to sell and convey real estate did not necessarily indicate that they were to sell free and clear of the dower of the widow. But the modern decisions, which, in my judgment, are more in accordance with common sense, tend to hold that a power and direction to sell necessarily includes the idea of conveying the title free and clear of dower," citing, among other cases, *Colgate v. Colgate*, 23 N. J. Eq. 372.

e. **Provision for a Division Between Widow and Children.**—The decided cases are not harmonious as to whether a wife must elect between her dower and the benefits of the will when her husband devises his estate or the residue thereof to her and her children, share and share alike. Perhaps by the weight of authority she will, in such a case, be put to her election: See *Matter of Estate of Gotzian*, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333; *Bailey v. Boyce*, 4 Strob Eq. (S. C.) 84. Contra, *Closs v. Eldert*, 51 N. Y. Supp. 881, 30 App. Div. 338. It is held in *Hatche's Estate*, 62 Vt. 300, 22 Am. St. Rep. 109, 18 Atl. 814, that under a will by which a husband, after making two specific be-

quests, devises the residue of his estate, real and personal, one-third to his wife, two-ninths to his daughter, and four-ninths to his son, his widow will take both her homestead and dower.

In case of a devise to a wife for life or during widowhood, and at her death or marriage the estate to be equally divided between the testator's heirs, an election to take under the will does not defeat dower: *Sully v. Nebergall*, 30 Iowa, 340. And a devise to a widow, to be held and used by her as she may see fit until a certain child becomes of age, then to be equally divided among the children, and, in the event of her marriage before that time, the executor to collect the rents for the children and give her her dower, does not intend the use of the property to be in lieu of dower: *Kelly v. Ball*, 14 Ky. Law Rep. 132, 19 S. W. 581. But in *McLeod v. McDonnell*, 6 Ala. 236, a wife is put to her election under a will in these terms: "That all my property, both real and personal, of which I am now possessed, or may hereafter accrue, be retained and continued together till my youngest child may arrive at lawful age; at which time all the above property, with its increase, to be equally divided among all my lawful heirs." She would take a vested interest in one-sixth of the estate, there being five children. And where a testator gives the use of all his property to his wife and children until the youngest attains his majority, at which time the widow is to have one-third and the residue is to be divided among the children, she cannot hold her distributive share under the law and also take under the will: *Howard v. Smith*, 78 Iowa, 73, 42 N. W. 585. Where a testator makes a specific devise of lands to his widow, and then devises other lands to her in trust for the use of their children, to be divided among them on their majority, she cannot claim dower in the latter real estate: *Van Guilder v. Justice*, 56 Iowa, 669, 10 N. W. 238.

f. Other Devises and Bequests.—A provision of a will giving a widow a life use of the homestead does not bar her right to also take her one-third under the law: *Richards v. Richards*, 90 Iowa, 606, 58 N. W. 926; nor does a provision giving one-half of the rents to her for life, and directing the estate to be divided among the children on her death: *Garrett v. Vaughan*, 59 S. C. 516, 38 S. E. 166; nor does a devise of a dwelling-house to the widow during life or widowhood, together with a bequest of certain household furniture and other property, the rest of the real property to be divided among the testator's children, who were to aid in her support if she requested it: *Jackson v. Churchill*, 7 Cow. 287, 17 Am. Dec. 514. A request to a widow that she release her dower in the residuary estate does not put her to an election: *Miller v. Miller*, 49 N. Y. Supp. 497, 22 Misc. Rep. 582.

On the other hand, it has been held that where a husband devises his whole property, if there is one part thereof with respect to which it is clear that he did not intend it should be subject to dower, it follows that he did not intend any portion to be subject to dower,

and his wife is put to her election: *Worthen v. Pearson*, 33 Ga. 285, 81 Am. Dec. 213. And she is put to her election when he makes a provision for her, and then disposes of the entire remainder of his estate: *Apperson v. Bolton*, 29 Ark. 418; or where he gives a power to his executors to rent, lease, repair and insure the real estate, until sold or divided, and out of the rents and profits to pay a provision made for her: *Tobias v. Ketchum*, 32 N. Y. 319; or where he gives, after the payment of his debts and funeral expenses, to her during her life the rents, income, interest, use, and occupancy of all his estate, real and personal, on the condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep the estate in good repair: In the *Matter of Zahrt*, 94 N. Y. 605; or where he gives her certain personal property in lieu of dower in his personalty, and directs her to sell certain lands and invest the proceeds for the benefit of the children, the gift of personal property is in lieu of dower in the lands directed to be sold: *Haszard v. Haszard*, 19 R. I. 374, 34 Atl. 150.

III. Statutory Enactments.

a. **Their Effect on the Common-law Doctrine.**—The common-law rule that a devise or bequest in favor of a wife is presumed to be in addition to her dower, unless the contrary appears from the will, and that she is not forced to elect between them, unless the benefits of the will are manifestly inconsistent with the claim of dower, has been reversed by statute in many of the states; so that a testamentary provision by a husband in favor of his wife is deemed to be in lieu of dower, and puts her to an election between the two, unless it plainly appears from the will that the testator intended she should enjoy both. These statutes usually provide a certain time in which she may signify her descent from the will and claim her dower, and her failure to renounce the testator's bounty within such time bars her right to dower: *Sanders v. Wallace*, 118 Ala. 418, 24 South. 354; *Stokes v. Pillow*, 64 Ark. 1, 40 S. W. 580; *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611; *Wilson v. Moore*, 86 Ind. 244; *Burkhalter v. Burkhalter*, 88 Ind. 368; *Miller v. Stephens*, 158 Ind. 438, 63 N. E. 847; *Huhlien v. Huhlien*, 87 Ky. 247, 8 S. W. 260; *Bayes v. Howes* (Ky.), 68 S. W. 449; *Hastings v. Clifford*, 32 Me. 132; *Dow v. Dow*, 36 Me. 211; *Collins v. Carman*, 5 Md. 503; *Reed v. Dickerman*, 12 Pick. 145; *Adams v. Adams*, 5 Met. (Mass.) 277; *Stearns v. Perrin* (Mich.), 30 N. W. 297; *Wall v. Dickens*, 66 Miss. 655, 6 South. 515; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729; *Craven v. Craven*, 17 N. C. 335; *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867; *Hill v. Hill*, 62 N. J. L. 442, 41 Atl. 943; *Corry v. Lamb*, 45 Ohio St. 203, 12 N. E. 660; *Demoss v. Demoss*, 7 Cold. (Tenn.) 256; *Application of Wilber*, 52 Wis. 295, 9 N. W. 162; *Van Steenwyck v. Washburn*, 59 Wis. 486,

48 Am. Rep. 532, 17 N. W. 289; *Melms v. Pabst Brewing Co.*, 93 Wis. 140, 66 N. W. 244; *Willey v. Lewis*, 113 Wis. 618, 88 N. W. 1021.

A devise of land to be enjoyed while the devisee remains the testator's widow is a devise within a statute declaring that a devise to a widow will bar her dower, unless renounced: *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150. And a gift of one-third the net income of the testator's lands bars dower: *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407. A condition attached to a devise in trust, that the devisee shall give a bond for the support of the testator's widow during her life, puts her within the Wisconsin statute: *Turner v. Scheiber*, 89 Wis. 1, 61 N. W. 280. A legacy, in order to bar dower, need not be larger in amount than would the inheritance, in case there were no will: *Cribben v. Cribben*, 136 Ill. 609, 27 N. E. 70. Of course, if the language of the will clearly shows an intention to give the wife an estate or property in addition to that given by the law, there is no necessity for an election: *Like v. Cooper*, 132 Ind. 391, 31 N. E. 1118.

Under the Montana statute providing that a devise of land shall bar dower, unless otherwise expressed in the will, such a devise is held a bar to dower in lands conveyed by the husband alone, during coverture: *Spalding v. Hershfield*, 15 Mont. 253, 39 Pac. 88. But the Missouri statute declares that "if any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of the husband whereof he died seised," unless the will declares otherwise; and under it, a widow is not put to her election as to lands which the testator had conveyed without his wife joining with him, and of which he did not die seised: *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621.

If the statute provides, in effect, that where a testator by will devises any land or interest therein to his wife, such devise shall be in lieu of dower in his real estate, unless he otherwise declares in his will, a bequest of personal property does not, like a devise of real estate, compel her to renounce the provisions of the will, or make an election, in order to be endowed of her husband's lands: *Jennings v. Smith*, 29 Ill. 116; *Brown v. Pitney*, 39 Ill. 468; *Pemberton v. Pemberton*, 29 Mo. 408; *Martien v. Norris*, 91 Mo. 465, 3 S. W. 849.

b. Conflict of Laws.—A statute providing that a widow shall not be entitled to dower in addition to the provisions of the will, unless such plainly appears to have been the intention of the testator does not apply to lands outside the state: *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. But a foreign will devising land within the state is governed by the statute: *Jennings v. Jennings*, 21 Ohio St. 56. The Virginia statute declaring that a bequest of personal property is to be considered as in lieu of dower, unless the contrary appears in some writing signed by the party making the provision, has no application to foreign wills of personalty, which, at the common

law, are construed according to the *lex domicillii*; so that where a person domiciled in New York bequeaths personalty to his wife, but makes no disposition of real property in Virginia, and the will contains nothing incompatible with the claim of dower, the will is construed by the common-law doctrine of New York, to the effect that a testamentary gift will not be regarded as in lieu of dower, unless the testator's intent to the contrary appears from express words, or by necessary implication: *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67.

IV. Community Property.

The common-law rule governing the doctrine of election between the right of dower, and the benefits of the will, has been adopted by the courts in dealing with the question of election where a widow's right in community property is in issue. Accordingly, if a husband undertakes to dispose by will of the entire community property, and his widow chooses to accept a testamentary provision in her favor, she thereby becomes divested of her interest in the common property, provided the assertion of the community right would necessarily defeat the objects of the will. But, in order to put her to her election between the provision of the will and her right in the community property, the provision must be expressly declared to be in lieu of her interest in such property, or else an intention on the part of the testator that his bounty should be in lieu of such interest must be deduced by clear and manifest implication from the terms of the will, based upon the fact that her claim to her share in the community would be inconsistent with the will, or repugnant to its provisions so as to disturb or defeat them.

When there is no such express declaration, or no such clear and manifest intent, she may take what the law allows her, and also what the will gives her: *Morrison v. Bowman*, 29 Cal. 337; *Estate of Silvey*, 42 Cal. 210; *King v. Lagrange*, 50 Cal. 328; *Estate of Frey*, 52 Cal. 658; *In re Stewart*, 74 Cal. 98, 15 Pac. 445; *In re Gilmore*, 81 Cal. 240. 22 Pac. 655; *In re Smith's Estate* (Cal.), 38 Pac. 950; *Theall v. Theall*, 7 La. 226, 26 Am. Dec. 501; *Pratt v. Douglas*, 38 N. J. Eq. 516; *Crosson v. Dyer*, 9 Tex. Civ. App. 482, 30 S. W. 929; *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648; *McClary v. Duckworth* (Tex. Civ. App.), 57 S. W. 317; *Gilroy v. Richards* (Tex. Civ. App.), 63 S. W. 664; *Skagg v. Deskin* (Tex. Civ. App.), 66 S. W. 793.

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PEOPLE v. HYATT.

[172 N. Y. 176, 64 N. E. 825.]

EXTRADITION Between the States of the Union is not governed by international law, but depends solely on the federal constitution, and the act of Congress made under it. No person can be extradited from one state to another unless the case falls within the constitutional provision. (p. 707.)

EXTRADITION.—To be a Fugitive from Justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. (pp. 708-721.)

EXTRADITION.—The Fact that a Person not Actually Present in a state, at the time of the commission of the alleged crime, was subsequently present in the state for a single day, nearly a year before the institution of any prosecution against him, does not give the state a right to demand him from another, as a fugitive from justice. (pp. 711, 712.)

EXTRADITION.—The Warrant of the Governor in extradition proceedings is presumptive, but not conclusive, evidence that the person is a fugitive from justice. (pp. 714, 719.)

HABEAS CORPUS—Extradition.—The Action of a Governor in issuing a warrant of extradition may be reviewed on habeas corpus. (p. 716.)

Adelbert Moot and William L. Marcy, for the appellant.

J. Murray Downs and Robert G. Scherer, for the respondent.

180 CULLEN, J. The relator was arrested and held under a mandate or warrant of the governor of this state issued on the requisition of the governor of the state of Tennessee for the delivery of the relator as a fugitive from justice. The mandate of the governor recites that it has been represented to him that the relator stands charged in the state of Tennessee with having committed the crime of larceny and false pretenses in the county of Davidson, and that he had fled from said state and taken refuge in the state of New York. By stipulation between the parties it was conceded that the indictments attached to the requisition papers under which the governor issued his warrant were found on the twenty-sixth day of February, 1902, and that the alleged crimes charged in the indictments were committed on July 1, 1901, May 8, 1901, and June 24, 1901, respectively. At the hearing had on the return of the writ of habeas corpus it was further stipulated between the parties that the relator was not in the state of Tennessee at the time of the commission of any of the offenses charged against him, but in the state of Maryland, which was his residence. It appeared by his testimony that he went to

Nashville in Tennessee on the second day of July, 1901, to accept the resignation of one Albright, the president and treasurer of the American Hardwood Company, in which the relator was interested, and was then elected president of the company in said Albright's stead; that that evening he left Nashville and never was again in the state of Tennessee except passing through there on the 16th or 17th of July. It is not claimed that the offenses for which the extradition of the relator was sought were committed when he was in the state of Tennessee, but it is contended that though not corporeally present at the time of the commission of the offense, he may nevertheless be properly surrendered as a fugitive from the justice of that state where it was committed.

It is to be premised that the power of a government to punish for extraterritorial crimes is a very different question from that of its right to require the surrender to it from foreign countries for trial and punishment persons alleged to ¹⁸¹ have committed such offenses. Some governments assume to impose the obligations of their penal laws either in whole or in part on their citizens, no matter where they may be. We have a notable example of this rule in the recent punishment of a British peer for an alleged bigamy committed in the United States. Some governments assume to go even further, and punish an alien for an offense committed against their citizens, though the offense is committed in a foreign jurisdiction. Publicists and writers on international law differ greatly as to the right of a government to punish for offenses committed without its territory. A full review of this subject is to be found in the work of Mr. John Bassett Moore, late assistant secretary of state of the United States, on "Extraterritorial Crime." The power of any government to punish for such an offense necessarily depends upon its ability to obtain possession of the defendant; and though each government assumes to define its own powers, still it may be restrained by the action of the government of which the offender is a citizen, invoked on his behalf, as was the case in the controversy between this country and Mexico in relation to which the report of Mr. Moore was written. Not so with extradition between the states of the Union; it is not governed by international law, but depends solely on the provisions of the constitution of the United States and the act of Congress made from it. The power of a state to punish a fugitive from justice after obtaining custody of his person depends in no way on how that custody was ob-

tained. Even if the offender has been kidnaped in another state and brought within the territory of the prosecuting state, that fact does not affect the jurisdiction of the latter to punish him for the offense: *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. Rep. 225; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40. Nor will a person be relieved from prosecution at the intervention of the state from which he was abducted by violence: *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. In *Iascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. Rep. 687, it was said: "If the fugitive be regarded as not lawfully within the limits of the state in respect to any other crime than the one on which his ¹⁸² surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offenses any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever." It was there held that interstate rendition did not depend on comity or contract, but on the provisions of the constitution of the United States. It will thus be seen that the condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf however much its process may be abused. Therefore, it necessarily follows that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states.

The provision of the constitution of the United States (article 4, section 2, subdivision 2) is: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Under this, Congress has enacted (section 5278): "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit . . . charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty

of the executive authority of the state or territory to which such person has fled to cause him to be arrested . . . and to cause the fugitive to be delivered." It will be seen that to authorize or require a state to surrender to another state an alleged offender it is necessary not ¹⁸³ only that such person stand charged with crime, but that he has fled from justice. What constitutes a fugitive from justice has been the subject of much discussion by eminent text-writers and of many decisions by the courts and by the governors of the several states. There seems to be substantial unanimity in all the authorities on one proposition, that to be a fugitive from justice a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. "The case, and the only case, for which the constitution provides, is that of a person who is charged with crime in one state and who flees to, and is found in, another state. This is the whole of the case": Spear on Extradition, 311. "The question of constructive presence at the commission of a crime has frequently arisen in the case of obtaining money or goods by false pretenses, and it has been held that such presence in the demanding state is not sufficient as a basis for a requisition for the surrender of a person as a fugitive from justice, although, if the person charged were to come within the jurisdiction of that state, he might be arrested and punished for the false pretenses there committed while he was corporeally elsewhere": Moore on Extradition, sec. 584. In *Matter of Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148, it was said by Mr. Justice Harlan: "Undoubtedly, the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, it is said by Mr. Justice Matthews: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, ¹⁸⁴ or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state com-

mitted that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." In *Matter of Voorhees*, 32 N. J. L. 141, a fugitive is designated as one "who commits a crime within a state and withdraws himself from such jurisdiction." In *Wilcox v. Nolze*, 34 Ohio St. 520, it is said, referring to the constitutional provision: "These words, taken as they must be in their natural and obvious sense, do not include a case of constructive presence in the demanding state and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made." The same principle has been held in *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Matter of Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *In re Jackson*, 2 Flipp. 183, Fed. Cas. No. 7125; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968. It is stated in a note found in Mr. Moore's work on Extradition (page 948) that "the Interstate Extradition Conference held in New York City in August, 1887, refused to adopt a recommendation to the governors of the various states and territories that no demand be complied with where the fleeing was constructive, on the ground that the decisions of the courts already covered the case."

Hibler v. State, 43 Tex. 197, is not in conflict with these authorities, for there a fugitive from justice was defined to be "a person who commits a crime in one state for which he is indicted, and departs therefrom and is found in another state." The only case cited as authority for a contrary doctrine is *In re Cook*, 49 Fed. 833, reported in the supreme court as *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40. In the opinion there delivered by the district judge it is said: "One may commit an offense against a state upon whose soil he has never set foot." I have already said this may be true, but it does not determine the question whether the offender is a fugitive from justice. In that case the petitioner was under ¹⁸⁵ arrest in Wisconsin, having been extradited by the governor of the state of Illinois. He sought relief from imprisonment by writ of habeas corpus from the United States circuit court for Wisconsin. The question of the propriety of his extradition was, therefore, not properly before the court, and the decision of the circuit court remanding the relator was affirmed by the supreme court on the express ground that it was immaterial

how the relator's presence in Wisconsin had been secured; that it was sufficient that at the time of the writ he was subject to its territorial jurisdiction. Nor did the case in fact require from the learned judge the statement cited. The relator was charged with having as a banker fraudulently received deposits. He had been in the state of Wisconsin a few days before, and knowing the bank to be insolvent, gave his clerks directions to receive deposits. His subsequent departure from the state, under all the authorities, made him a fugitive from justice.

The question discussed has never been passed upon by the courts in this state, but has been considered by several of our governors. In *Matter of Mitchell*, 4 N. Y. Crim. Rep. 596, will be found an opinion by Governor Hill on an application for the extradition of Thomas Mitchell. Mitchell was charged with having committed manslaughter in Jersey City by reason of his ownership of an unsafe building in that place which fell and killed four persons. It appeared that Mitchell had not been in New Jersey for some weeks prior to the accident. The governor refused to extradite him, holding that "the actual presence of the accused party in the demanding state, at the time of the commission of the alleged offense, is a jurisdictional fact." This view has been accepted by the governors of Massachusetts, of Maryland, of Tennessee and of Illinois: See Moore on Extradition, sec. 579 et seq. It is claimed that this court has held a contrary doctrine in *Adams v. People*, 1 N. Y. 173. The defendant Adams was indicted and convicted for obtaining money under false pretenses under a fraudulent warehouse receipt which he transmitted from Chillicothe, in Ohio, to the prosecutors, merchants in ¹⁸⁶ New York City. The case in no respect involved the question of the constitutional obligation of the governor of Ohio to surrender the defendant to the authorities of the state of New York, but only of the power of this state to punish him after having secured jurisdiction of his person. Under the authorities already cited from the supreme court of the United States it was of no importance how the jurisdiction of his person was obtained.

If the relator was not otherwise subject to extradition to the state of Tennessee, because he was not personally present in that state at the commission of the alleged offenses, his subsequent presence in the state for a single day, nearly a year before the institution of any prosecution against him, could give that state no right to require his surrender. The question is

whether he is a fugitive from justice, not whether the courts of the state of Tennessee have jurisdiction of his alleged offenses. That jurisdiction they have at all times, if at all, provided they secure his person. I am at a loss to imagine how a man's voluntary visit to a state can constitute him a fugitive from the state when he was not such before. I consider it as having exactly the contrary effect. If there be any force in the occurrence, it must be not in his going into the state but in his failing to remain there. It is not, however, suggested that he in any respect offended against the laws of Tennessee while present there. He went there for a specific purpose, and his business accomplished immediately left. It is not pretended that his stay was curtailed or that he left the state on account of any suspicion of a prosecution. Would he have been liable to extradition because on a journey to New Orleans his route passed through the state of Tennessee? Such a result seems to me utterly unreasonable. No distinction can be drawn between the two cases. In the case of Adams, already referred to, the prisoner sought discharge from arrest by habeas corpus, and the opinion of Judge Vanderpoel of the superior court of the city of New York denying the application is found in 7 Law Rep. 386. Adams came voluntarily into the state, and after ¹⁸⁵⁷ making an engagement to meet one of the prosecutors, suddenly left the state and failed to keep his engagement. The decision proceeded on the ground that the evidence justified the inference that the prisoner prematurely departed from the state with the view of avoiding arrest and prosecution for his crime. The case has not escaped criticism, though its doctrine may be correct when limited to the facts of the case; that is to say, a departure from the state to avoid prosecution, of which there is no suggestion in the case before us. In truth, however, the questions discussed by the court were not properly before it at all. They could have been raised in the state of Ohio, but not in New York.

It is urged that this doctrine of the necessity of corporeal presence in the state where the offense is alleged to have been committed will render the several states asylums for criminals, the effect of whose offense is injury to property or persons in other states. There is no practical danger of the kind. It may be safely stated that nearly every state, as well as our own, punishes crimes committed within the state, although the results of the crimes are effected without its territory. The rascal would be properly surrendered to the state of Maryland,

where he was at the time of his alleged offense, if that state made demand for him. On the other hand, there is great danger that citizens may be carried into other states to be punished for acts which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example. By our Penal Code, section 514, it is provided that "a purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated. It may be that this provision of the code has no extraterritorial effect, and that a citizen of this state, if found in another state, may be punished there for alleged oral pretenses ¹⁸⁸ made here. But neither the constitution nor the federal statute requires this state to surrender him for prosecution in another jurisdiction. These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published here and circulated throughout the country. The real evil of the day is not the insufficiency of the criminal laws, but the excessive multiplication of statutory crimes.

It is suggested (though not by counsel) that I have construed the stipulation of the counsel for the state of Tennessee too broadly, and that it was intended to admit only that the defendant was not in Tennessee at the particular dates alleged in the indictment, not that he was absent from Tennessee at the commission of the offenses charged against him. The brief of the learned counsel entirely disposes of this suggestion. He makes but two points: 1. "A person charged with crime may be extradited, although he was not within the demanding state at the time of the commission of the alleged offense"; 2. "The supreme court is limited on habeas corpus to review but one question—namely, the question of identity." I have, therefore, but followed the counsel's own construction of his admission.

We now reach the question whether the action of the governor can be reviewed on habeas corpus. It has been held by the supreme court of the United States in *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. Rep. 514, that the governor of a state in the execution of the duty of surrendering fugitives imposed by the constitution and the statute of Congress does not act as a United States officer, and that a writ of habeas

corpus may be issued by the state courts to test the validity of an arrest under his warrant. In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, it was said: "How far his [the governor's] decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court." In *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, it was held: "We have no doubt that the governor upon whom the demand is made must determine for himself, in the first instance at least, whether the party charged is in fact ¹⁸⁹ a fugitive from justice, but whether his decision thereon be final is a question proper to be determined by the courts of that state." The constitution and laws of the state of New York, therefore, control the decision of the question we are now considering. While doubtless, to a certain extent, the action of the governor is executive or ministerial, it is not so in the broad sense in which the general functions of the office are conferred upon him by our constitution. In *Matter of Guden*, 171 N. Y. 529, 64 N. E. 451, we held that the power given to the governor to remove a sheriff upon charges and after a hearing was executive and the exercise of that power not subject to review by the courts. But the question here is of an entirely different character. It involves the liberty of the citizen. Speaking of the division of powers among the three great branches of the government, Parker, C. J., in the *Guden* case said: "There resides in the people of this and every state an absolute power to prescribe rules of action, through legislation, to enforce rules of action and to transact generally the affairs of government, through executive acts, and to determine controversies between, enforce rights belonging to, and redress wrongs done to, citizens of the state, through the courts." The liability of the citizen to arrest and detention, and the grounds therefor, therefore, necessarily present a judicial question, though the arrest and detention are affected by an executive or ministerial officer. The act of Congress provides that a copy of the indictment or the affidavit before a magistrate shall be proof of the charge of crime against any person whose extradition is sought, but it does not prescribe what shall be evidence that he is a fugitive from justice. The fact that he is a fugitive is, therefore, a matter of proof. While the warrant of the governor is presumptive evidence of the fact, there is no reason on principle why it should be conclusive. It was said by Judge Jenkins in *Matter of Cook*

(49 Fed. 833), referring to the case of *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291: "That decision by its very terms implies that the action of the governor is only presumptively regular, and can be reviewed by the courts. Surely it cannot be claimed that such action is conclusive ¹⁹⁰ upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. 'No person shall be deprived of life, liberty or property without due process of law.' That is the fundamental law of the land, coming to us from Magna Charta. It is not due process of law which condemns without hearing, which convicts without trial. . . . It is essential to compliance with such executive demand that the person whose surrender is demanded should be adjudged a fugitive from the justice of the demanding state. The decision of the executive is not conclusive of that fact." The writ of habeas corpus is in this state available to every person imprisoned or deprived of his liberty, unless he is restrained under the authority of the federal government, or unless he is committed by virtue of a final judgment or decree of a competent tribunal of jurisdiction, or the final order of such a tribunal punishing him for contempt. The warrant of the governor is not a final judgment nor a decree, and even were it such it would be the duty of the court to see whether the jurisdictional facts exist which are necessary to authorize the action of the governor. The provision of section 827 of the Code of Criminal Procedure, directing that any person arrested on the governor's mandate shall be brought before a judge of a court of record and informed of his right to a writ of habeas corpus to inquire into his identity with the person named in the warrant, does not assume to limit the inquiry on a writ of habeas corpus to the question of identity. It was enacted for the benefit of any person arrested under such a warrant, and solely as an additional safeguard against illegal removal from the state. As was held in *People v. Liscomb*, 60 N. Y. 560, 19 Am. Rep. 211: "This writ cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when ¹⁹¹ public safety requires, in either of the two emergencies named in the constitution." If, therefore, on the return to the writ it is clearly shown that the relator is not a fugitive from jus-

tice, and there is no evidence from which a contrary view can be entertained, which is the fact in this case, as appears by the stipulation and concession of the parties, there is no reason why greater efficacy should be given to the warrant of extradition than to the warrant of any other magistrate by which a citizen is imprisoned or deprived of his liberty. In *People v. Brady*, 56 N. Y. 182, this court discharged the relator, who was held under a warrant of extradition issued by the governor of the state, on the ground that the affidavit on which the surrender was asked did not state a crime. In *People v. Pinkerton*, 77 N. Y. 245, the only question decided was whether the warrant of the governor recited the facts necessary to confer authority under the constitution and laws of the United States, and was sufficient justification for holding the prisoner to be brought up on habeas corpus without producing the papers or evidence upon which the governor acted. It was held that the recitals were to be taken as prima facie true, no proof to the contrary having been introduced by the prisoner. In *People v. Donohue*, 84 N. Y. 438, again the only question was the sufficiency of the executive warrant on its face. Referring to criticisms that had been made on the decision in the *Lawrence* case the court said: "And hence we have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition. Our ruling in this respect has not escaped criticism; but an opposite conclusion, which would make the determination of the executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment." In all these cases the question related to the sufficiency of the charge ¹⁹² against the prisoner, not to his being a fugitive. But if the courts can review the action of the governor on one prerequisite for extradition, it is difficult to see why they cannot equally review his action on the other. The great weight of authority in other states is in favor of such a review. It was so held in the cases of *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116, *Wilcox v. Nolze*, 34 Ohio St. 520, *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217, and *Matter of Mohr*, 73 Ala. 503, 49 Am. Rep. 63. In the *Wilcox* case it is said: "Whether or not the accused committed the acts complained of while actually present in the demanding state is jurisdictional, and it is clearly competent, in

such case, to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matter of form." In the Jones case it is said: "The governor of this state is not clothed with judicial powers, and there is no provision of the constitution or laws of the United States, or of this state, which provides that his determination is final and conclusive in the case of the extradition of the citizen. In the absence of such a provision we hold that the decision of the governor only makes a *prima facie* case; that it is competent for the courts in a proceeding of this character to inquire into the correctness of his decision, and discharge the prisoner." In the Mohr case the learned court said: "We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice. Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of habeas corpus, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief cornerstones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty is inadequate for the just purposes for which it has been invoked in this case."

193 There is little to be added to what has been so well said by the jurists of other states. The further suggestion, however, may be made, that no law gives a person sought to be extradited the right to a hearing before the governor or to submit evidence in his behalf. Whatever in these respects may be accorded by the governor to the accused is a matter of favor, not of right. Therefore, unless he may review his extradition on habeas corpus, a citizen, on the fiat of an executive officer, without a hearing, may be transported a prisoner to the utmost confines of the country. It has been held by the supreme court of the United States that in the case of foreign extradition there must be some competent evidence before the magistrate to authorize the surrender of the accused: *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. Rep. 689. But if the orders made below are upheld, in the case of interstate extradition, a citizen may be surrendered without the slightest evidence either of his guilt or that he is a fugitive.

The guilt or innocence of an alleged fugitive from justice is not to be determined on requisition proceedings, nor on the writ of habeas corpus. Therefore, if the charge is such as to necessarily require the presence of the accused within the state at the time of the commission of the offense, mere proof of an alibi would not in every case require or justify his discharge. But the question in the present case is not one of alibi, for the stipulation of the parties admits that the defendant was not personally present in the state of Tennessee at the commission of the alleged offenses.

For these reasons the orders of the special term and the appellate division should be reversed and the relator discharged from custody.

O'BRIEN, J. I agree with Judge Cullen in his exposition of the principles applicable to this case. It may possibly be useful to add to this very clear and able exposition of the law some suggestions with a view of eliminating from the case certain considerations that are misleading and wholly foreign to the questions involved, and a word with respect to the functions ¹⁹⁴ of the writ of habeas corpus and the procedure thereon in cases of interstate extradition. It is declared by statute to be a state writ to inquire into the cause of detention, and in a proper case to discharge the person from all restraint of his liberty. In some cases the writ cannot issue at all—namely, in cases where the restraint or detention is by virtue of a mandate from a court or judge of the United States in cases where such court or judge has exclusive jurisdiction. Neither can it issue in a case where the party is detained by virtue of the final judgment or decree of any competent tribunal, civil or criminal: Code, sec. 2016.

The applicant for the writ must show affirmatively in his petition that he is not detained under any such process, and should it appear upon the hearing that he is, then he must be remanded: Code, secs. 2032, 2033. In other words, when certain facts are made to appear as the cause of the detention the inquiry can go no further, but must stop and the applicant must be remanded, however unjust in point of fact his detention may be. In all other cases there are no limitations upon the scope of the inquiry, but it must proceed until the issue is determined according to the rules of law applicable to such a case. The burden in the first instance is upon the officer or party who detains the person to show that such detention is authorized by some legal authority.

The relator in this case was not detained under process from any court, civil or criminal, but under an executive warrant commanding the defendant to deliver him to an agent of another state, to be brought to that state for trial upon a charge of crime alleged to have been committed in that state, and hence all the facts were open to inquiry. The defendant made return to the writ that he detained the relator under this warrant, but exhibited no other document or paper to sustain the warrant. The warrant on its face stated that it had been represented to the governor of this state by the governor of the state of Tennessee that the relator was charged in that state with the crime of larceny and false pretenses, and that he had fled from that state and taken refuge in this state. ¹⁹⁵ These statements on the face of the warrant were to be taken as presumptively true in the first instance, and, if the inquiry rested there, the defendant had made out a prima facie case to justify the detention. It is important here to note and to keep always in view that when the defendant presented the executive warrant without any other document or paper or any other proof of the facts therein stated he raised only a presumption. The warrant did not conclusively establish the facts recited. It was so held by this court (*People v. Brady*, 56 N. Y. 182), and the law as laid down in that case has never been modified but has been repeatedly approved. Indeed, I do not understand that there is now any difference of opinion as to the legal effect of the warrant as evidence. It raised a presumption, but nothing more. I am not aware of any case in any court of controlling authority where it was held to be conclusive and no reason is given why it should be.

But a mere legal presumption is good, and justifies an act only until it is removed by proof of some other fact, and when so removed the act stands without authority or justification. That, in my opinion, is just what happened in this case as will appear hereafter. It must be borne in mind all the time that we know nothing, and can know nothing, judicially concerning the facts or circumstances of the larceny and false pretenses charged in the warrant. The record does not even contain the indictment or any other paper or proof as to the facts, if any, that transpired in the demanding state. All we know, or can know, are the things recited in the warrant. The statute provides (Code, sec. 2039) that the relator may, under oath, deny any material allegation of the return or

state any fact to show that his intention was illegal or that entitled him to his discharge. The relator did so traverse the return and thus put the facts stated in the warrant in issue. The court thereupon was required to proceed in a "summary way to hear the evidence" and dispose of the case as justice required. The relator proved one material fact conclusively, and that was that he was not within the demanding state at the ¹⁹⁰⁶ time of the commission of the crime as that fact was averred in the indictment. I do not mean that his oath on that point was conclusive, but the proof was of a higher character—namely, the stipulation of the respective attorneys in open court. These were admissions upon the record that import absolute verity for all the purposes of the inquiry, and they had the legal effect to remove every presumption to the contrary that arose from the face of the warrant: 1 Greenleaf on Evidence, sec. 186. It is important to understand the real scope and effect of these admissions. They were: 1. That three indictments were attached to the requisition papers upon which the warrant was issued, and as they were not produced we know nothing as to their contents except as stated in the admission, and that statement was. 2. That all of them were found on February 26, 1902, and the alleged crimes were charged in the indictments to have been committed on May 1, 1901, May 8, 1901, and June 24, 1901, respectively. So that we simply know that the relator was charged with three distinct offenses of larceny and false pretenses committed on the dates above stated. 3. It was also admitted and stipulated that the relator was not within the state of Tennessee between May 1, 1899, and July 1, 1901, but was in that state on July 2, 1901.

These are all the facts that the demanding state elected to disclose upon the hearing of the writ of habeas corpus as the grounds for taking the relator from this state against his will into another jurisdiction. Not a single fact is before us that raises any question as to the constructive presence of the relator in the demanding state on the dates named in the indictment, or that would warrant even the suspicion that he committed the crimes charged by means of an innocent agent. All that is said upon that subject is pure conjecture, without any fact upon which to build up the speculation. On the record before us the relator was presumptively personally present in the demanding state at the dates named, and there took and carried away the property claimed to have been

stolen, or he did not, and could not, commit the offense charged ¹⁹⁷ in that state at all. It having been conclusively established that the relator was not in the demanding state on the dates when the crimes are charged to have been committed, it follows that he could not have committed the offenses, and certainly could not have fled from the justice of the demanding state. The authorities are unanimous in holding that a person cannot be a fugitive from the justice of the demanding state who was not in that state when the crime charged is alleged to have been committed. Constructive presence furnishes no basis for executive action. The cases on that subject are collected in a note to the case of *State v. Hall*, 28 L. R. A. 289. The presumption arising from the recitals in the executive warrant was completely overthrown by the admissions upon the hearing before the court that the relator was not in the demanding state at the dates when it was alleged that the crimes were committed, and this left the warrant, under which the relator was in custody, without any basis upon which to rest.

This proposition is met only in one way and by one line of argument which should now be noticed. It is suggested that since the relator was in the demanding state on the second day of July, 1901, for a few hours on a temporary errand of business, that he may have committed some or all of the crimes charged while there on that day, and that since the precise dates stated in the indictment are not material, it may be shown upon the trial that he actually did commit the crimes on that day, and hence this court should send the relator to the demanding state for trial. This suggestion may possibly have the merit of ingenuity, but as a method of reasoning or argument, or as a judicial utterance in a case involving personal liberty, it is to be hoped that this court will not adopt it. The state of Tennessee and its agent were represented at the hearing upon the writ by able counsel. All the facts and circumstances constituting the alleged crimes were open to inquiry. It could have been shown that there was, or might have been, a mistake in stating the dates in the indictment, or it could have been shown that the crimes were actually ¹⁹⁸ committed on the second day of July following, but nothing of the kind was claimed or even suggested. The demanding state, its agent and counsel, for some reason, elected to withhold all proof of the facts and circumstances of the alleged larcenies and to stand upon the bare recitals in the warrant.

The prima facie proof that the state gave, consisting only of the recitals of the warrant, that the relator was personally present there at the dates named and committed the crimes, was superseded and removed by the solemn and conclusive admissions in open court that he was not there at the time, and consequently could not have fled from justice. When the prosecution alleges and proves a larceny committed at a designated time and place, and makes no claim that it was committed at any other time or place, and the accused then shows by conclusive proof that he was not in the state on the days designated, nor for a year before, nor for eight days after, and the case rests upon these facts alone, without any proof to justify even a suspicion that the crime was committed eight days after the date laid in the indictment, it would be a strange rule of law that would permit the case to go to the jury in order to procure a finding that, after all, the time laid in the indictment was a mistake and the crime was committed by the accused at the later date.

But the case of *Roberts v. Reilly*, 116 U. S. 80, 8 Sup. Ct. Rep. 291, is cited to sustain this line of argument, and an expression of the learned judge who spoke for the court is made prominent. This court, and every other court, has often commented upon the value of isolated judicial expressions in an opinion as authority. The facts of the case upon which the decision was based must be compared with the one in hand, in order to enable us to interpret the decision and the language of the opinion. The difference in the facts of that case and the one at bar is so radical and fundamental that it will be seen at a glance that it has no application.

1. In that case the state of New York, the demanding state, took a very different course from that adopted by the demanding state in the case at bar. It did not rest its right ¹⁹⁹ upon the recitals of the warrant, but produced all the papers upon which it issued, thus disclosing to the court all the facts and circumstances constituting the crime charged. The warrant was there supported by all the preceding facts and the recitals became wholly immaterial. Not so here, since the recitals give us all the light we have, and they are conclusively contradicted by the admissions of record.

2. Not only did the court have all the papers before it, but proof was given dehors the record as to all the facts and circumstances of the crime. There was full disclosure and nothing was withheld, so that at the close of the hearing the ques-

tion whether the accused was or was not a fugitive from justice was one of fact. Not so in this case, since, after the admissions, we have not a single fact left to show that the relator fled from the state of Tennessee.

3. In that case there was nothing but the oath of the accused that he was not in the demanding state at the time charged in the indictment, and that was of no consequence against all the other proof to show that he was. His oath was not conclusive, whereas in the case at bar we have an admission that is conclusive that he was not in the state at the time, and nothing to place against it, unless we are to presume that the crime was committed on the second day of July, when no one claims that it was. The court ought not to presume that the crime was committed on that day against the allegations of the indictment and without any claim from any source that it was. If presumptions are to be made in such a case, they should be in favor of personal liberty and not against it.

But the question whether the relator committed larceny in the state of Tennessee at any time when he was personally present there is not really in the case at all, since there is not now, and never was, any serious claim that he was in that state when the crimes charged were committed, otherwise than constructively. Constructive presence in the demanding state is the sole basis of the claim that the relator fled from its justice, and, as already suggested, there is no case or authority that I ²⁰⁰ am aware of that sustains such a claim. All the cases are the other way, and we must either disregard these cases or adopt the fiction that the offenses were really committed by the relator while he was in the state on July 2, 1901.

It may, before closing, be profitable to call special attention to a case quite similar, since it shows how such cases as this are considered and disposed of by courts in the demanding state of Tennessee. I refer to the case of *State v. Jackson*, 36 Fed. 258, 1 L. R. A. 370, which is quite instructive. It appears that Jackson resided in Chicago. He sold to the prosecutor, who resided at Chattanooga, a horse, the bargain having been made by correspondence. The horse was shipped to the purchaser by rail at the place last named and he admitted by mail to Jackson at Chicago the purchase price. When the horse arrived his qualities were found to be such that the purchaser claimed to have been defrauded out of his price by false and fraudulent statements. He protested to

obtain a warrant from a justice of the peace at Chattanooga against Jackson in Chicago, charging him with obtaining money by fraud and placed the warrant in the hands of a detective, who made an affidavit that Jackson had fled from the state of Tennessee and had taken refuge in the state of Illinois. On this affidavit and warrant he procured a requisition from the governor of Tennessee on the governor of Illinois for the delivery to him of Jackson. Armed with these papers the detective proceeded to Illinois and obtained a warrant from the governor of that state for the arrest of Jackson. He arrested him on the warrant, hurried him off to Tennessee and there had him tried before the justice of peace, convicted and sent to jail. It will thus be seen that Jackson was not only extradited from his home in another state, but actually tried and convicted in the demanding state. But Jackson sued out a writ of habeas corpus in Tennessee and was discharged on the ground that all the proceedings were based upon a falsehood—namely, that he had fled from Tennessee, where he had never been before.

The opinion of the court is very brief, but pointed. After 201 citing the act of Congress, the learned judge said: "According to the provisions of this law there must be not only the commission of the crime, but the person charged must be a fugitive from the state in which it was committed before the executive authority can be called into action. Jackson was not a fugitive. He had not in all his life been in Tennessee; had never fled from it; and his case did not fall within the positive terms of this law. The oath of the detective was false, and the governors of the two states imposed upon. The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained, the opportunities for wrong and abuse of law will be great and widespread. Commercial transactions are largely conducted by mail and by telegraph. If the seller at one end of the line and the buyer at the other, with the aid of detectives, in cases of dispute and controversy among them, are to be allowed, under such proceedings as these, to have the citizens of one state carried to another state for trial under the allegation that the person charged has fled, instances of oppression may not be few."

It would be quite difficult to point out any material distinction between that case and the one at bar. It is quite clear that should we send the relator to Tennessee, he would be entitled there to his discharge by the same court that dis-

charged Jackson on the facts now before us. That court held that the accused party could not be deprived of his liberty by executive action based upon the false affidavit of a detective that he had fled from Tennessee to Illinois. That, in my opinion, is a safe precedent to follow in this case. Some one in this case has made just such an affidavit. That must follow from the admission that the relator was not in the demanding state at the times stated in the indictment as the dates when the alleged crimes were committed. On the hearing in this case upon the return of the writ, the state of Tennessee could have shown all the facts and circumstances of the alleged crime for which it had demanded the surrender to it of the person of the relator, as this state did in the Roberts case. But instead of taking that course, all the facts and circumstances ²⁰² are left clouded in mystery, except so far as they are disclosed by the admissions referred to. When it admitted that the relator was not in the state at the times laid in the indictment, and gave no other light as to the facts, the case for detention failed. The state of Tennessee does not ask for the surrender of the relator on the ground that he committed any crime in that state on the second day of July, 1901, nor does it even suggest that its prosecuting officer made any mistake in stating the 24th of June as the true date of the commission of the offense. The relator is claiming the benefit and protection of the laws of this state which guarantee to him his liberty against all unlawful restraint. If he has actually fled from the justice of the demanding state, of course he ought to be surrendered; but it is admitted that he did not, and it is safe to say that no one believes for a moment that he did except, possibly, in the same way and in the same sense that Jackson fled from the same state in the case cited. Personal liberty must rest in this state upon a very frail and unsafe basis if this court can be induced to send the relator to Tennessee upon such a vague and fanciful conjecture as that which is at the foundation of the fiction that he may in fact have committed the crime on the 2d of July, and that the prior dates stated by the prosecuting officer of that state are the result of some error or mistake. When the state of Tennessee, or some one authorized to speak for it, is willing to assure us that the suggestion is based upon fact and not upon fiction, it will be timely then to entertain it, but until then the courts of this state should treat its solemn admission upon the record according to its fair scope and mean-

ing, which obviously is that the relator was not in the state when the crimes charged were committed. I am in favor of reversing the order.

Haight, J., Dissented, and said in part: "As we have seen, the last indictment charged the crime as having been committed on the twenty-fourth day of June. Time is not a material ingredient of the crimes of larceny or false pretenses; it would, therefore, have been competent upon the trial to show that the offenses charged were actually committed on the second day of July, when the relator was in the state, instead of the twenty-fourth day of June. The indictments were before the governor; they charged the commission of the crime of larceny. The usual allegation is that he did then and there take, steal, and carry away, which imports the presence of the person charged. Under the statute, a charge may be established before the governor by the production of a copy of the indictment. It therefore furnishes some evidence upon which the governor may act. As we have seen, the relator has neglected to show, either by stipulation or by his own testimony, that he was not actually present at the time the offenses charged were committed. He has confined his testimony to showing that he was not there on the particular dates specified in the indictment. This is not sufficient. It consequently follows that the contention of the relator to the effect that the governor had no power to issue the warrant for his arrest and his return to the state of Tennessee, for the reason that he was not personally present in that state when the offense was committed, is not raised by the record in these proceedings.

"The warrant upon which the relator is detained recites all the facts necessary to give the governor jurisdiction to issue it. It is not contended that it is informal or defective in any particular. It recites that the governor of Tennessee presented papers to the governor of this state, duly authenticated, including copies of the indictments found, charging the relator with having committed the crimes of larceny and false pretenses in that state, and that he 'has fled therefrom, and taken refuge in the state of New York.' This, if true, is sufficient to authorize the governor of this state to issue the warrant for his arrest and return to the state of Tennessee. The papers presented to the governor, upon which he made his determination to issue the warrant, have not been returned, or their contents made to appear by the relator, either in his petition or traverse. They, consequently, are not before us, and we are unable to determine whether the conclusion of the governor was proper or without support of evidence": Citing and reviewing *People v. Brady*, 56 N. Y. 182; *People v. Pinkerton*, 77 N. Y. 245; *People v. Donohue*, 84 N. Y. 438; *Matter of Clark*, 9 Wend. 212; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291; *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. Rep. 689;

Bryant v. United States, 167 U. S. 104, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 270-278, 22 Sup. Ct. Rep. 488.

And, in conclusion, he said: "The prevalence of crimes committed in one state by persons actually in another state, through innocent agents employed by them, such as the forwarding of forged drafts, checks, and other instruments through the mails, express agencies, or otherwise, for the purpose of procuring money or other property thereon, makes it desirable that the question should be determined as to whether, under the constitution and statute of the United States, a person found in one state can be surrendered up, to be taken to another state for trial, for a crime committed therein, through some innocent agency of his, when he was only constructively present in the person of his agent. That question, however, ought to be determined by the supreme court of the United States. The conclusions reached upon the points above discussed render it unnecessary for this court to determine it in this case."

The order appealed from should be affirmed.

Parker, C. J., Gray and Vann, JJ., concur, with Cullen and O'Brien, JJ.; Werner, J., concurs with Haight, J.

Ordered accordingly.

The Supreme Court of the United States, in error to the court of appeals of the state of New York, affirmed the decision rendered in the principal case: See Hyatt v. People of New York, 188 U. S. 691, 23 Sup. Ct. Rep. 456. Mr. Justice Peckham delivered the opinion of the court in the following language:

"By clause 2 of section 2 of article 4 of the constitution of the United States, it is provided:

" 'A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.'

"It is held in *Kentucky v. Dennison*, 24 How. 66, 104, that this provision of the constitution was not self-executing, and that it required the action of Congress in that regard. Congress did act by passing the statute approved February 12, 1793: 1 Stat. at L. 302, c. 7. The substance of that act is reproduced in section 5278 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 3597), as follows:

" 'Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall

be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory.'

"The proceedings in this case were under this section, and the warrant issued by the governor was sufficient *prima facie* to justify the arrest of the relator, and his delivery to the agent of the state of Tennessee. Certain facts, however, must appear before the governor has the right to issue his warrant. As was said in *Roberts v. Reilly*, 116 U. S. 80, 95, 6 Sup. Ct. Rep. 291, 300, it must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded was substantially charged with a crime or not was a question of law, and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; that the question whether the person demanded was a fugitive from the justice of the state was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory. How far his decision might be reviewed judicially in proceedings in habeas corpus, or whether it was conclusive or not, were, as stated, questions not settled by harmonious judicial decisions nor by any authoritative judgment of this court, and the opinion continues as follows:

"'It is concluded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof.'

"In *People v. Brady*, 56 N. Y. 182, it was held that the courts have jurisdiction to interfere by writ of habeas corpus, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another state is issued, and, in case the papers are defective and insufficient, to discharge the prisoner.

"In the case before us, the New York court of appeals held that if, upon the return to the writ of habeas corpus, it is clearly shown that the relator is not a fugitive from justice, and there is no evidence from which a contrary view can be entertained, the court will discharge the person from imprisonment, but that mere evidence of an alibi or evidence that the person demanded was not in the state as alleged, would not justify his discharge, where there was some evidence on the other side, as habeas corpus was not the proper proceeding to try the question of the guilt or innocence of the accused. And the court also held that the conceded facts showed the absence of the accused at the time when the crimes, if ever, were committed, and that the demand was in truth based upon the doctrine that a constructive presence of the accused in the demanding state at the time of the alleged commission of the crime was sufficient to authorize the demand for his surrender.

"We are of opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed. This is in accordance with the authorities in the states cited in the opinion of Judge Cullen in the New York court of appeals, and is, as we think, founded upon correct principles: *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. Rep. 544, recognizing authority of states to act by habeas corpus in extradition proceedings.

"If upon a question of fact, made before the governor, which he ought to decide, there were evidence pro and con, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive. But here, as we have the testimony of the relator (uncontradicted) and the stipulation of counsel as to what the facts were, we have the right, and it is our duty, on such proof and concession, to say whether a case was made out within the federal statute justifying the action of the governor. It is upon the statute that the inquiry must rest.

"In the case before us, it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where, in a proceeding like this, there is no proof, or offer of proof, to

show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments; and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes, were, if ever, committed.

“The New York court of appeals has construed the stipulation as conceding these facts, and we think that its construction of the stipulation is the correct one.

“It is, however, contended that a person may be guilty of a larceny or false pretense within a state without being personally present in the state at the time. Therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the state.

“The exercise of jurisdiction by a state to make an act committed outside of its borders a crime against the state is one thing, but to assert that the party committing such act comes under the federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition.

“The language of section 5278 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 3597), provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice by the executive authority of a state to which such person has fled, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any state, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, shall be produced, and it makes it the duty of the executive authority of the state to which such person has fled to cause him to be arrested and secured. Thus, the person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when, in fact, he was not within the state at the time the act is said to have been com-

mitted. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact, fled therefrom.

"In *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. Rep. 1148, 1152, it was stated by Mr. Justice Harlan, in speaking for the court:

"The only question remaining to be considered relates to the alleged want of competent evidence before the governor of Utah at the time he issued the warrant of arrest to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required, by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding state, and, therefore, could not be said to have fled from its justice. Upon the executive of the state in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent

proof, that the accused is, in fact, a fugitive from the justice of the demanding state.'

"To the same effect is *Roberts v. Reilly*, 116 U. S. 80, 544, 6 Sup. Ct. Rep. 291. In that case the issue was made about the presence of the party in the demanding state at the time the act was alleged to have been committed, and there was direct and positive proof before the governor of Georgia, upon whom the demand had been made, and there was no other evidence in the record which contradicted it. It was said (p. 97, Sup. Ct. Rep. p. 300):

" 'The appellant, in his affidavit, does not deny that he was in the state of New York about the date of the day laid in the indictment, when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that state on that very day; and the fact that he has not been within the state since the finding of the indictment is irrelevant and immaterial.'

"It is clear that it was regarded by the court as essential that the person should have been in the state which demanded his surrender at the time of the commission of the offense alleged in the affidavit or indictment, and that it was a fact jurisdictional in its nature, without which he could not be proceeded against under the federal statute.

"*Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. Rep. 40, decides nothing to the contrary. In that case the party was arrested in Illinois on account of a crime which, it was alleged, had been committed by him in Wisconsin. He sued out a writ of habeas corpus in Illinois to test the legality of his arrest under the circumstances appearing in the case. Upon the hearing, the court decided the arrest to be legal, and the party arrested acquiesced in this disposition of the case, and made no attempt to obtain a review of the judgment in a superior court. It was not until after his arrival in Wisconsin, whither he was taken by virtue of the warrant issued by the governor of Illinois, and after his trial had begun in Wisconsin, that he made application to the circuit court of the United States in Wisconsin to be released upon habeas corpus, upon the ground he had originally urged, that he was not a fugitive from justice within the meaning of the constitution and laws of the United States. The court decided against him, holding that he had been properly surrendered. This court said that, assuming that the question might be jurisdictional when raised before the executive or the courts of the surrendering state, that it was presented in a somewhat different aspect after the person had been delivered to the agent of the demanding state, and had actually entered the territory of that state, and was held under the process of its courts. And it was said that the authorities tended to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding state; that it is too late for him to object even to jurisdictional defects in his surrender, and

that he was rightfully held under the process of the demanding state. Whether the claim made by the party brought to Wisconsin that he was illegally arrested in Illinois was well founded or not, this court did not feel called upon to consider, or to review the propriety of the decision of the court below, and this on the ground that it was proper to wait until the state court had finally acted upon the case, and then to require the accused to sue out his writ of error from this court to the highest state court where a decision could be had, instead of determining the question summarily on habeas corpus.

"It is contended, however, that there are cases in this court which sustain the proposition maintained by the plaintiff in error herein, and *Kentucky v. Dennison*, 24 How. 66, is referred to as authority. It is therein held that the words 'treason, felony, or other crime,' spoken of in the constitution, included every offense forbidden and made punishable by the laws of the state where the offense is committed and it is therefore argued that as an act committed outside its borders may, under certain circumstances, become a crime against the state, a person thus committing such an act comes within the meaning of the constitution, and should be surrendered upon demand of the governor of the state whose law he is alleged to have violated.

"On looking at that case, it is seen that the facts were wholly different, and the court had no such case as the one before us in mind. The party against whom the demand was made had committed the crime, as alleged, within the state of Kentucky, and no question arose as to his liability to be returned to Kentucky for any act done by him outside its borders. The governor of Ohio, upon whom the demand was made, acting under the advice of his attorney general, refused to surrender the fugitive because the crime alleged was neither treason nor felony at common law, nor was it one which was regarded as a crime by the usages and laws of civilized nations, and the governor was advised that obviously a line must be somewhere drawn distinguishing offenses which did, from offenses which did not, fall within the scope of the power granted by the constitution. It was in regard to this contention that this court held as stated. Mr. Chief Justice Taney, delivering the opinion of the court, said (p. 99):

"The words 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony: 4 Blackstone's Commentaries, Wendell's ed., 5, 6, and note 3. But as the word 'crime' would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural

and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law, and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statute, growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney general of that state.

“But this inference is founded upon an obvious mistake as to the purposes for which the words “treason and felony” were introduced. They were introduced for the purpose of guarding against any restriction of the word “crime,” and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. . . .

“This compact, ingrafted in the constitution, included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to “demand” implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged or to the policy or laws of the state to which the fugitive has fled.’

“The court, however, held that while it was the duty of the executive authority of Ohio, under the circumstances, to deliver the person demanded, and that such duty was merely ministerial, and the governor had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment, yet it was also held that the federal courts had no means to compel the governor to perform the moral obligation of the state under the compact in the constitution, and that the courts could not coerce the state executive or other state officer, as such, to perform any duty by act of Congress. On that ground the motion for a mandamus to compel the governor of Ohio to issue his warrant was refused. Nothing in that case can be regarded as any authority for the proposition contended for here. The case assumed the presence of the party in the state at the time of the alleged commission of the crime. The question was whether upon such assumption the executive of the state upon whom the demand was made could examine as to the character of the crime and refuse to deliver up, in his discretion.

“To the same effect is *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. Rep. 1148. In that case the objection was made in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offense less than a felony. It was held that such view was erroneous, and *Kentucky v. Dennison*, 24 How. 66, was

cited in support of that proposition, yet it was in this very case of Reggel that the remarks already quoted were made, that the person demanded was entitled to insist upon proof that he was within the demanding state at the time that he is charged to have committed the crime, and subsequently withdrew therefrom to another jurisdiction, so that he could not be reached by the criminal process of the state where the act was committed.

"Many state courts before whom the question has come have held that a merely constructive presence in the demanding state at the time of the alleged commission of the offense was not sufficient to render the person a fugitive from justice; that he must have been personally present within the state at the time of the alleged commission of the act, or else he could not be regarded as a fugitive from justice. Spear and also Moore on Extradition are to the same effect. Those authorities and text-writers are referred to in the margin: Wilcox v. Nolze (1878), 34 Ohio St. 520, 524; Jones v. Leonard (1878), 50 Iowa, 106, 32 Am. Rep. 116; In re Mohr (1883), 73 Ala. 503, 514; In re Fetter (1852), 23 N. J. L. 311, 57 Am. Dec. 382; Hartman v. Aveline (1878), 63 Ind. 345, 30 Am. Rep. 217; Ex parte Knowles (1894), 16 Ky. L. Rep. 263; Kingsbury's Case (1870), 106 Mass. 223, 227; State v. Hall (1894), 115 N. C. 811, 20 S. E. 729; 2 Moore on Extradition, secs. 579, 581, 584; Spear on Extradition, 310 et seq.; Cooley's Constitutional Limitations, 4th ed., 21, note 1; 3 Crim. Law Mag. 806 et seq., published 1882.

"In the case of In re White, 5 C. C. A. 29, 14 U. S. App. 84, 55 Fed. 54, 58, in the United States circuit court of appeals for the second circuit, it was said by Lacombe, circuit judge, that it was proper to inquire upon habeas corpus whether the prisoner was in fact within the demanding state when the alleged crime was committed, for if he were not, it could not be properly held that he had fled from it.

"The subsequent presence for one day (under the circumstances stated above) of the relator in the state of Tennessee, eight days after the alleged commission of the act, did not, when he left the state, render him a fugitive from justice within the meaning of the statute. There is no evidence or claim that he then committed any act which brought him within the criminal law of the state of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it, and came away. The complaint was not made, nor the indictments found, until months after that time. His departure from the state after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and, if not, a subsequent going there and coming away is not a flight.

"We are of opinion that, as the relator showed, without contradiction, and upon conceded facts that he was not within the state of

Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if ever, committed, he was not a fugitive from justice within the meaning of the federal statute upon that subject, and upon these facts the warrant of the governor of the state of New York was improperly issued, and the judgment of the court of appeals of the state of New York discharging the relator from imprisonment by reason of such warrant must be affirmed."

Extradition.—The grounds on which one state may refuse to surrender a person demanded by the authorities of another are considered in the monographic note to *Barranger v. Baum*, 68 Am. St. Rep. 129-134. And the proceedings for the arrest and surrender in one state of fugitives from justice in another are considered in the monographic note to *Matter of Fetter*, 57 Am. Dec. 389-400. As to the review of extradition proceedings on habeas corpus, see *Barranger v. Baum*, 103 Ga. 465, 68 Am. St. Rep. 113, 30 S. E. 524.

SPITZER v. VILLAGE OF FULTON.

[172 N. Y. 285, 64 N. E. 957.]

SUFFRAGE.—A Statute Limiting the Right of suffrage as to the business and financial affairs of villages to the taxpayers of the municipality does not violate the article of the constitution defining the general qualifications of the electors of the state. (p. 739.)

Jordan J. Rollins, for the appellants.

Nevada N. Stranahan, for the respondent.

287 Per CURIAM. This action was to recover one thousand dollars which the plaintiffs had deposited with the defendant as earnest money to secure the performance by them of a bid or contract for the purchase of one hundred and fifteen bonds of the par value of one thousand dollars each, to be issued by it for the purpose of securing the money with which to construct a system of waterworks within its boundaries for the use of the defendant and its inhabitants. The bonds were advertised for sale, and each bidder was required to deposit a certified check for one thousand dollars. The check of the successful bidder was to be applied on account of the purchase price of the bonds, or to be retained by the defendant as liquidated damages in case the purchaser should fail to comply with his bid. The plaintiffs made a written bid for the purchase of the bonds, and delivered to the treasurer of the defendant a cashier's check for one thousand dollars, to be applied on the purchase price of the bonds if awarded to them. The bonds were thus awarded. They were tendered

to the plaintiffs, but they refused to accept them, and notified the defendant that they elected to rescind their contract. They then made a demand upon the fiscal officer of the defendant for the amount thus deposited, which was refused, and this action was commenced.

The defendant demurred to the complaint upon the ground that it appears upon its face that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained at special term and unanimously affirmed by the appellate division.

That the defendant was authorized by chapter 269 of the 288 Laws of 1898 to establish a system of waterworks and to issue bonds for that purpose is not denied. The contention of the plaintiffs is that that statute was unconstitutional and void, because it was in conflict with the provisions of section 1, article 2 of the constitution of the state, which defines the general qualifications of the electors of the state as follows: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people; and upon all questions which may be submitted to the vote of the people."

The provisions of the statute of 1898, which the plaintiffs claim rendered it unconstitutional, are as follows: "A voter at a village election must possess the following qualifications: 1. To entitle him to vote for an officer, he must be qualified to vote at a town meeting of the town of Volney, and must have resided in the village thirty days next preceding such election; 2. To entitle him to vote upon a proposition, he must be entitled to vote for an officer, and he or his wife must also be the owner of property in the village, assessed upon the last preceding assessment-roll thereof." The manifest purpose of these provisions was to define the qualifications of electors who should be authorized to vote at the various municipal elections of the defendant for the election of its public officers, and also to define the qualifications they must possess to vote upon the various propositions which should arise as to the business or financial affairs of the municipality. To vote for

public officers, they were required to possess only the qualifications required of an elector of the town in which the defendant corporation was situated, which were only such as an elector was required to possess under the provisions of article two. But when a proposition was presented to be ²⁸⁹ voted upon which related only to the business or private affairs of the corporation, and involved the creation of a debt or an extraordinary expenditure to be raised by taxation, then the added qualification of being a taxpayer was required.

The contention of the plaintiffs is that the provisions of chapter 269 contain a restriction upon the provisions of article 2 as to the right to vote for elective officers, and upon all questions which may be submitted to the vote of the people, and, hence, are violative of its provisions. The obvious purpose of that article was to prescribe the general qualifications that voters throughout the state were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs. But we are of the opinion that that article was not intended to define the qualifications of voters upon questions relating to the financial interests or private affairs of the various cities or incorporated villages of the state, especially when, as in this case, it relates to borrowing money or contracting debts. This becomes manifest when we also consider section 1 of article 12 of the constitution, which provides: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations." Article 2 must be construed in connection with article 12. When read together, we have two provisions of the constitution which relate to this question. The first was intended merely to define the general qualifications of voters for elective officers, or upon questions which may be submitted to the vote of the people which affect the public affairs of the state; the second, a provision by which it is made the duty of the legislature to protect the taxpayers of every city and village in the state, and to restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent any abuse thereby. One is general, relating to the whole state. The other is in effect local, relating only to the cities and villages ²⁹⁰ of the state. One relates only to the general govern-

mental affairs of the state. The other relates to the business or private affairs of the municipalities specified. By the latter section the manner of restraining municipal corporations from contracting debts and of preventing abuses in that regard is left to the sound discretion of the legislature, and was to be controlled by such legislation as it should deem proper and which tended to secure that end. What better or more effective method of preventing such abuses and protecting such taxpayers could be devised than to restrict the right of voting upon propositions for borrowing money or for contracting debts, to the persons who are liable to be taxed for the payment of such debts? Indeed, the proposition that the incurring of such indebtedness shall be sustained only when a majority of the taxable inhabitants shall vote in its favor seems not only to be pre-eminently just, but such has been the method which has hitherto been generally, if not universally, adopted by the legislature to restrain the various villages of the state in their power of borrowing money or contracting debts so as to prevent such abuses. Not until now, so far as we know, has it been even claimed that such a provision was violative of the article of the constitution defining the general qualifications of the electors of the state. Indeed, the established policy of this state has been to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and it has never been its policy to confide their financial affairs to the general voters therein.

When we consider all the provisions of the constitution bearing upon this subject, we feel assured that none of the changes or amendments of that instrument was intended to alter or affect the power of the legislature to restrict the right of villages to borrow money or contract debts for unusual or extraordinary expenditures to cases where a majority of the taxpaying electors should, by their votes, consent thereto. It was the obvious intention of its framers to provide that any abuses of that character should be prevented by the legislature,²⁹¹ and article 12 so plainly declares. Such, we think, was the purpose and effect of the legislation under consideration, that it was fully justified, and is not in conflict with the provisions of the organic law. Hence, we conclude that the proceedings of the defendant which resulted in issuing the bonds in question were justified by the statute, that it is valid, and that the judgment herein should be affirmed.

The judgment and order should be affirmed, with costs.

Parker, C. J., and Gray, Bartlett, Martin, Cullen, and Werner, JJ., concur.

Haight, J., absent.

Judgment and order affirmed.

A Statute Requiring a Property Qualification of voters at a municipal election is held constitutional in Hanna v. Young, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674.

JAMESTOWN BUSINESS COLLEGE ASSOCIATION v. ALLEN.

[172 N. Y. 291, 64 N. E. 952.]

EVIDENCE—Parol to Vary Note.—A promissory note, executed contemporaneously with a writing showing that the note was given for a scholarship, the course of study to be entered upon at about the date of the note's maturity, and the scholarship to be transferable, cannot be contradicted by parol evidence that it was not to be paid if the maker should not attend the school, and could not sell the scholarship. (p. 741.)

EVIDENCE—Parol to Vary Writing.—Evidence of what was said between the parties to a writing, either before or at the time of its execution, cannot be received to vary or contradict its terms, except to show that a writing which purports to be a contract is in fact no contract, or to complete the entire contract of which the writing is only a part. (pp. 741, 742.)

Action upon a note in this form:

"\$90.00 Jamestown, N. Y., Aug. 17, 1897.

"August 1, 1898, after date. I promise to pay to the order of Jamestown Business College Ass'n. Ltd., ninety dollars at the Jamestown National Bank. Value received.

"ELVA J. ALLEN."

Contemporaneously with the execution and delivery of this note, the following paper was executed:

"SINGLE SCHOLARSHIP.

"JAMESTOWN BUSINESS COLLEGE ASSOCIATION, LIMITED.

"H. E. V. Porter, President.

"No. ——— Jamestown, N. Y., Aug. 17, 1897.

"\$90.00

"I, Elva J. Allen, of P. O. Box 186, Cattaraugus, N. Y., have this day purchased a Two years Scholarship in Business Shorthand and English Department of Jamestown Business College, Jamestown, N. Y., for the sum of \$ Ninety to be used

by myself, who will enter upon the course of study about August 1, 1898, for which we, or either of us, promise to pay to the order of Jamestown Business College Association, Limited, \$ Ninety as follows:

"August 1, 1898.

"Name, ELVA J. ALLEN.

"Witness, JULIA BYRNE.

"Scholarship transferable upon the following conditions:

"1st. The above contract shall be paid in full and certified by the Treasurer.

"2nd. In case ————— has received instruction in his Scholarship it is understood and agreed that he shall pay for such time at the regular advertised rates of tuition, whereupon the party to whom this may have been transferred shall be entitled to instruction according to the terms of this agreement.

"H. E. V. PORTER,

"President."

Alfred L. Furlow, for the appellant.

George J. Dikeman, for the respondent.

294 WERNER, J. Under the unanimous affirmance by the appellate division of the judgment entered upon the verdict of the jury herein, the only question presented by this record that survives to reach this court is the single exception taken by the plaintiff to the admission of parol evidence, given by the defendant, in contradiction of the written instrument upon which the action is founded. I think that the exception referred to was well taken. The action is upon a promissory note. The complaint is in the usual form in such actions. The answer alleges want of consideration and an agreement that the note was not to be paid if the defendant did not take the course of instruction at plaintiff's school, for which the note was given. Upon the trial, under these pleadings, the plaintiff introduced the note in evidence and rested its case. Thereupon the defendant, under the direction of the court, assumed the affirmative of the issue and introduced evidence in support of the allegations of her answer. Despite plaintiff's objection to any oral testimony tending to vary or contradict the written instrument, the defendant was permitted to testify that the note in suit was not to be paid if she should decide not to attend plaintiff's school and could not sell her scholarship. I think this ruling of the trial court was erroneous, and that the exception thereto requires a reversal of this judgment.

The general rule that evidence of what was said between

the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, applies to promissory notes and bills of exchange: *Thompson v. Ketchum*, 8 Johns. 190, 5 Am. Dec. 332; *Norton v. Coons*, 6 N. Y. 33; *Read v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250.

As stated in *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961, and *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 305, 57 N. E. 480, there are two classes of exceptions to this general rule of evidence. The first class includes those cases in which parol evidence is received to show that a written instrument which purports to be a contract is in fact no contract at all. The other class "embraces ²⁹⁵ those cases which recognize the instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. Receipts, bills of parcels and writings that evidently express only some parts of the agreement are examples of this class which leaves the written contract unchanged, but treats it as part of an entire oral agreement, the remainder of which was not reduced to writing. Two things, however, are essential to bring a case within this class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract; 2. The parol evidence must be consistent with, and not contradictory of, the written instrument."

I think the case at bar does not fall within either of these exceptions. In form, the instrument sued upon is a complete contract. This is equally true as regards the note alone, or the note and the certificate of scholarship together considered as parts of the same contract. If it is a contract at all, it is a complete contract. The oral evidence received over plaintiff's objection did not serve to amplify or complete the writing; it was radically contradictory thereof. The mere statement of this fact is the only argument necessary to show that the case is not in the class of cases in which oral testimony is received to complete contracts which are only partly reduced to writing. Does the oral testimony received over plaintiff's objection tend to show that the written instrument, which was a complete contract in form, was in fact no contract? This question suggests the distinction between this case and the

cases upon which the defendant relies. According to the testimony of the defendant, the delivery of the note in suit was not conditional upon the happening of some event before it was to become a binding obligation; on the contrary, it is said to have been complete and unconditional. The ²⁹⁶ defendant says, in substance, that the note became effective at once, and was to be binding upon her unless she should decide not to take instructions at plaintiff's school and could not sell her scholarship, in which event it was to be canceled and she was not to be called upon to pay it. Had the parties agreed that the note should not be regarded as completely delivered until the defendant should take such instructions, or until she could sell her scholarship, it would not have become operative until either of these events had transpired. The agreement which the parties did make was just the reverse of that. The note is stated to have been actually and unconditionally delivered, and was to be and remain a note until the defendant should decide either to sell the scholarship, if that were possible, or to abandon the projected course of instruction. As the note was not payable until a year after its date, and the course of instruction was not to begin until the note became due, the defendant's claim is, in reality, an assertion that the note was to be regarded as a valid and binding obligation until it became due, when it was to be optional with the defendant to decide whether it should then be payable or not. This was not a conditional delivery which held the consummation of the contract in abeyance, but an absolute delivery which, as the defendant supposed, could be annulled in a certain contingency at her option. It is obvious, therefore, that there is a radical distinction between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery, like the one at bar, which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case there is no contract until the condition has been complied with; in the other there is a binding contract, notwithstanding the happening of the contingency relied upon to defeat it. For the foregoing reasons the cases of *Seymour v. Cowing*, 1 Keyes, 532, *Reynolds v. Robinson*, 110 N. Y. 651, 18 N. E. 127, *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119, *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32, and kindred cases, holding that conditions limiting and circumscribing the delivery of written ²⁹⁷ instruments may be shown by parol, are not applicable to the case at bar.

This case seems to fall directly within the principle "that parol evidence of an oral agreement made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add or to subtract from the absolute terms of the written contract": *Specht v. Howard*, 16 Wall. 564; *Forsyth v. Kimball*, 91 U. S. 291; *Brown v. Wiley*, 20 How. 442; *Brown v. Spafford*, 95 U. S. 474; *Read v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250.

For these reasons I think the parol evidence above referred to was erroneously admitted, and, therefore, the judgment herein should be reversed and a new trial ordered, with costs to abide the event.

Haight, J., Dissented, and in part said: "The defendant introduced evidence to show that the note was delivered upon the conditions and under the circumstances alleged in her answer and proved by her on the trial. If the note was without consideration, or if it was delivered upon the condition that it was to be payable only in the event of the defendant's attending the plaintiff's college or selling the scholarship, we think it would constitute a defense to this action, and evidence to prove those facts was admissible. The only consideration for the note claimed by the plaintiff was the delivery to the defendant of the scholarship mentioned. An examination of that paper shows that there was no express agreement by the plaintiff to furnish the defendant with any instruction whatever. It contained, first, a statement by the defendant that she had purchased a two years' scholarship, to be used by herself, and that she would enter upon the course of study about August, 1898, for which she promised to pay ninety dollars. That contract was signed only by the defendant and a subscribing witness. Then followed the conditions upon which the scholarship might be transferred. That was signed by the plaintiff. But we find nowhere in that paper any express promise by the plaintiff to furnish the instruction mentioned in the certificate. Although in the portion of the contract relating to a transfer it is provided that the transferee should be entitled to instruction according to the terms of this agreement if the conditions therein were complied with, yet, when the agreement referred to is examined, no terms requiring the plaintiff to give the defendant instruction are found. As the only consideration which the plaintiff pretends there was for the defendant's note was this agreement, it is difficult to see how such an agreement, which contained no promise to furnish the defendant instruction, could be a consideration for the note in suit. . . . This action was brought by the payee of the note, so that no question as to a bona fide holder is involved. Hence, the fact that there was no consideration for it was a defense to this action. It is true that if the defendant had received the instruction mentioned, she would have been liable upon the

ground that that was a sufficient consideration; still, not having received any instruction, and there being no promise on the part of the plaintiff to furnish it, there was no consideration for the note: *Sawyer v. Chambers*, 43 Barb. 622; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85; *Peck v. Burwell*, 48 Hun, 471, 1 N. Y. Supp. 33; *Bookstaver v. Jayne*, 60 N. Y. 146; *Keuka College v. Ray*, 167 N. Y. 96, 101, 60 N. E. 325.

"The only remaining question is whether the defendant was properly permitted to prove that the note in question was delivered to the plaintiff's agent upon the express condition that if the defendant did not attend the plaintiff's school, or sell the scholarship, the plaintiff would surrender the note and the defendant would not be liable thereon. We think it was competent for her to show the terms upon which the note was delivered, to restrict and limit her liability thereby, and to protect herself against liability, unless she actually received the instruction, which was the only contemplated consideration for her note": Citing *Benton v. Martin*, 52 N. Y. 570, 574; *Bookstaver v. Jayne*, 60 N. Y. 146; *Juilliard v. Chaffee*, 92 N. Y. 529, 534; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *Seymour v. Cowing*, 1 Keyes, 532; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Baird v. Baird*, 145 N. Y. 659, 664, 40 N. E. 222; *Blewitt v. Boorum*, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. 119; *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32.

Parker, C. J., Gray, Vann, and Cullen, JJ., concur with Werner, J.; Haight, J., dissents; Martin, J., not sitting.

Parol Evidence is not ordinarily admissible to vary or contradict the terms of a written instrument: *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489; *Haynes v. Wesley*, 112 Ga. 668, 81 Am. St. Rep. 72, 37 S. E. 990; monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672. But such evidence is admissible to complete a contract: *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; *Gould v. Boston Excelsior Co.*, 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554; or to show that there is no contract at all: *Burns etc. Lumber Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483; *Marston v. Kennebec Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389. A promissory note cannot be converted by parol testimony into a conditional contract: *Middleton v. Griffith*, 57 N. J. L. 442, 51 Am. St. Rep. 617, 31 Atl. 405. But see *Clinch Valley Coal etc. Co. v. Willing*, 180 Pa. St. 165, 37 Am. St. Rep. 626, 36 Atl. 737.

MATTER OF HOPKINS.

[172 N. Y. 360, 65 N. E. 173.]

WILLS—Cancellation of Signature.—The finding of a will in the testator's desk with his signature canceled raises the presumption that the cancellation was done by him with the intention of revoking it. (p. 746.)

WILLS.—An Expert in Handwriting Cannot Give an Opinion to the effect that perpendicular marks drawn across the letters of the signature of a will were not made by the same person who wrote the signature. (p. 752.)

Joseph W. Middlebrook, for the appellant.

Clarence S. Davison, James MacGregor Smith, and Ernest I. Edgcomb, for the respondents.

³⁶² HAIGHT, J. Robert E. Hopkins died at Tarrytown, in this state, on the ninth day of May, 1901. He was possessed of a large estate, and left him surviving Fanny W. Hopkins, his widow, and Robert E. Hopkins, Jr., his son, of the age of thirteen ³⁶³ years, his only heirs at law and next of kin. He, in company with other gentlemen, organized the Tide Water Oil Company and the Tide Water Pipe Company, and the greater portion of his time was occupied in attending to the business of those companies. His desk and office was in a room of the building in the city of New York, in which the business of the companies was chiefly transacted. He had two safe deposit vaults, one in the city of New York and the other at Tarrytown, and it was his custom to keep his valuable papers in one of those vaults. After his death a search was made for his will. It was not found in either of the safe deposit vaults, but the paper now propounded as his will was finally found the second or third day after his funeral in a little drawer under his roller-top desk in his office. When found his signature was canceled by fourteen nearly perpendicular marks with pen and ink drawn across the letters of his signature. The paper is dated the fourteenth day of November, 1891, and undoubtedly it was executed as his last will and testament at that date. And the only question of fact presented for the determination of the court is as to whether his signature thereto was canceled by him with the intention of revoking the will.

The finding of the will in the testator's desk with his signature canceled raised the presumption that the cancellation was done by him with the intention of revoking it. Williams on Executors (volume 1, page 85) says: "If a testament was in the custody of the testator, and upon his death it is found

among his repositories canceled or defaced, the testator himself is to be presumed to have done the act; and the law presumed that he did it *animo revocandi*." In Redfield on Wills (page 307) it is said: "The rule of evidence in the ecclesiastical courts, in regard to the presumptive revocations, from the absence or mutilation of the will, seems to be, that if the will is traced into the testator's possession or custody, and is there found mutilated in any of the modes pointed out in the statute for revocation, or is not found at all, it will be presumed the testator destroyed or mutilated it, *animo* ³⁶⁴ *revocandi*; but if it was last in the custody of another, it is incumbent upon the party asserting revocation, to show the will again in the testator's custody, or that it was destroyed or mutilated by his direction": See, also, 1 Jarman on Wills, p. 119, to the same effect.

Upon the trial the presumption that the will was revoked by the testator was sought to be overcome by showing that a previous search of the desk was made for the purpose of discovering the will, and that it was not then found; from which the claim is made that the will must have been in the possession of some other person than the testator, and that it was subsequently placed in the desk with the signature canceled. It appears that two searches of the desk were made. The first by opening the drawers and looking in, but not by carefully taking out the papers and examining them. The next day a more careful search was made, after looking through the deposit vaults. At this time the papers were taken out and examined, but the will was not found. This examination was made by Mr. Warren, who occupied a desk in the same room with the decedent, and who had been connected with him in business for twenty-five years. It was made in the presence of the widow and her brother, and was concluded between 1 and 2 o'clock in the afternoon. About 4 o'clock the same afternoon Mr. Warren went again to the desk to do some writing, and, he says, mechanically he put his hand on the little drawer and on pulling it open saw the blue envelope, which he took out and found to contain the will. The drawer appears to have been in little use, for it contained only a few pens and an ink eraser besides the envelope containing the will. It was not shown that any person had possession of the instrument or had any motive to cancel it other than the son, who became chiefly benefited by its cancellation. It is not pretended that it was done by him, as he was only thirteen years of age, and he was not shown to have been at the office

of his father after his death and before the instrument was found. It is, therefore, claimed upon the part of the guardian ad litem that the will was overlooked during the previous ³⁶⁵ examinations of the desk, and that the presumption in law that the will was canceled by the testator was not overcome by the evidence.

This brings us to the consideration of the other evidence given on behalf of the proponent to establish that the cancellation was not done by the testator. This evidence was given by the witness Carvalho, an expert in inks and handwriting. He was asked the following questions: "In your opinion, as an expert, were those perpendicular marks made by the same person as wrote the signature on that will?" This was objected to by the guardian ad litem, and the objection was overruled and an exception taken. He answered: "Judging from the material at hand, the signature of the will, I say, not." Q. "Judging from the signature 'R. E. Hopkins,' as appears on the first page, and the signature 'Robt. E. Hopkins,' as it is signed opposite the seal on the instrument, have you an opinion as to whether the marks, the fourteen marks, are written by the same hand?" To this the guardian ad litem also objected, and the same was overruled and exception taken. He answered: "I have an opinion." He was then asked: "What is that opinion?" Same objection, ruling and exception. He answered: "That they were not."

The will was drawn by a lawyer and was not in the handwriting of the testator. The signature appears upon the instrument at the end thereof, opposite the seal, and in the margin under the words "to the effect that an erasure was made before signing it." These signatures were written in a plain bold hand ten years before the testator's death, and were the only writings which the expert had before him with which to compare the cancellation marks. Were these marks "writings" within the meaning of chapter 36 of the Laws of 1880 and chapter 555 of the Laws of 1888, which permit the comparison of writings by experts? The appellate division appears to have been of the opinion that they were. But we do not understand that such was the purpose or intent of these statutes. These enactments were considered by this court in the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, in which ³⁶⁶ the purpose of these statutes was pointed out. Prior to their enactment, comparison was permitted only with writings in evidence which were material upon some of the issues of the case. The expert was, therefore, limited in his investigation

to an examination, in many instances, to but one or two specimens. The purpose of these statutes was to give him a broader field for his investigation by permitting other writings, which were not material upon the issues of the case, to be introduced in evidence solely for the purpose of comparison. The statutes do not purport nor were they intended to change the meaning of the word "writing" as it had theretofore been used and understood, or to authorize comparison with anything that was not previously regarded to be the subject of comparison.

The chief case relied upon in support of the admissibility of the testimony of the expert is that of *Lansing v. Russell*, 3 Barb. Ch. 325. In that case the action was brought to set aside two conveyances of real estate executed by C. Lansing shortly before his death, he then being ninety years of age. The deeds were executed by his making his cross opposite the seal. The crosses were proved by a witness who saw the deeds executed. To rebut this the complainant produced upon the trial several witnesses, who were cashiers of banks and experts in detecting forgeries and counterfeits, to testify that in their opinion the marks made to these deeds were not the marks of a person of the age of Mr. Lansing. The chancellor said with reference thereto: "I think the testimony of the experts, who had been in the habit of examining signatures and marks of young persons as well as of aged ones to prove that the marks to these deeds could not have been genuine marks of the unaided hand of old age and decrepitude, was properly received, upon the trial, as legal evidence to establish that fact." The testimony of these experts, however, was rendered unimportant, for the reason that the witness, who testified to the execution of the deed stated that Mr. Lansing, in making his mark, asked his son, who was standing by to steady his hand, and thereupon his ³⁶⁷ son took hold of his hand and assisted him in making the mark. It is true that this case is cited in the case of *Kowing v. Manly*, 49 N. Y. 192-203, 10 Am. Rep. 346, as is also that of *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317, but not with approval, as is claimed, but for the purpose of showing that the question then under consideration was not controlled by those cases.

It is apparent that the case of *Lansing v. Russell*, 3 Barb. Ch. 325, does not cover the question now presented. It is quite possible that an expert can determine whether a cross was made by a person in the prime of life with a steady hand, or by a person of advanced age with a feeble, trembling or shaking hand.

Such testimony is not based upon the comparison of writings, but is based upon the condition of the individual, and, therefore, the case is not decisive of that which we now have under review.

An expert may doubtless be able to determine whether one mark is made over another, whether a mark is made by a trembling or steady hand, and, if familiar with inks, he may also be able to determine nearly the age or the time that the writing was made. It has also been held that the mark of an individual to an instrument may be proved by those who have seen him make his mark to other instruments where the mark contains some peculiarity which they have noticed and observed, thus enabling them to distinguish it from other marks: *Strong v. Brewer*, 17 Ala. 706; *Paisley v. Snipes*, 2 Brev. (S. C.) 200; *George v. Surrey*, 1 Moody & M. (Eng.) 516. But this class of evidence is dependent upon the familiarity of the witnesses with the peculiarities of the persons making the cross, and is not the subject of the opinion of experts whose only knowledge or familiarity of writings is obtained by comparison.

In the case of *Jackson v. Van Dusen*, 5 Johns. 141-155. 4 Am. Dec. 330, Van Ness, J., in delivering the opinion of the court, says: "The testator having made his mark, no evidence of course could be given or expected to prove his handwriting." In that case, one of the witnesses to the will, Samuel Wheeler, signed the same by making his initials "S. W." The signing ³⁶⁸ of the will as a witness by Wheeler was proved by one Van Dyck, who had seen him sign the initial letters of his name and described the peculiarities of the characters as made by him. In this way he identified letters as having been made by Wheeler. This, the judge said, was not the proof of Wheeler's signature by comparison of hands. In *Jackson v. Jackson*, 39 N. Y. 153-160, Woodworth, J., says: "That when it is necessary to prove an execution of an instrument by a 'marksman,' the proof is evidence of the making of the mark. The writing of the name around it is no essential part of the evidence." In the case of *Shinkle v. Crock*, 17 Pa. St. 159, the will of Susan Crock was executed by making her mark. A witness who was not present at the execution of the will was permitted to testify to his belief that the mark was genuine. His belief was founded upon his acquaintance with the mark, claiming that it had certain peculiarities which distinguished it from others. The judgment was reversed upon this ground. Lewis, J., who delivered the opinion of the court, says: "We have gone far enough in receiving the bare belief of

a witness, founded upon a comparison of writing in dispute with some specimen of which he may have but a faint recollection. Where a mark, on inspection, appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence."

In the case of *Gilliam v. Parkinson*, 4 Rand. (Va.) 325, Carr, J., says: "In the case now before us, the attesting witness has made his mark. Now I ask, how could this be proved? There is a distinct individual character in the writing of every man who can write; and with those who have written much, that character is so fixed and striking that persons acquainted with it will find no more difficulty in recognizing it than in knowing the face of the writer. Where the name of a witness is written by himself, therefore, it may generally be proved with something like certainty. But here, there is no writing. The name of the witness is written by another, and he makes ³⁶⁹ a cross-mark; perhaps, the first and last he made in his life. To attempt to prove such a signature as this would be a mockery of justice."

In the case of *Jones v. Hough*, 77 Ala. 437, the remarks of the judge in *Gilliam v. Parkinson*, 4 Rand. (Va.) 325, are quoted with approval, as is also the case of *Watts v. Kilburn*, 7 Ga. 356, in which it is said that "where the name of a person is written by another and he makes a cross-mark, there is nothing distinctive to fix his identity." In *Travers v. Snyder*, 38 Ill. App. 382, the question was whether there can be a comparison between cross-marks or a mere mark and another. With reference thereto the court said: "How can simply a mark be recognized as that of any particular person without any proof of any particular characteristic by which it can be distinguished? It seems to us that it would be very unsafe, and lead to dangerous results to allow such comparison to be made and taken as evidence, unless, at least, some proof was made that the marks had some established characteristics like a handwriting that would enable it to be recognized. A mere cross or mark cannot be identified, and it therefore stands for itself alone."

In the early period of the English law expert testimony was unknown, but, as the world advanced in education, the courts commenced to avail themselves of the knowledge of others pertaining to scientific matters which was not possessed by ordinary individuals. From this beginning expert testimony has continued to grow in importance and in use until the present time. It, however, has met with much criticism

on the part of the courts, and it has been denounced as misleading and unsatisfactory in numerous cases. It is, however, useful in a variety of cases and within reasonable bounds should be encouraged. But we have now reached a case where it is sought to establish that mere marks made over the signature were not made by the person who wrote the signature, by the opinion of an expert. This is carrying the use of the opinions of experts beyond any reported case to which our attention has been called, and we now think ³⁷⁰ that the time has come in which a limitation shall be placed upon this class of evidence.

The general rule which admits of the proof of the handwriting of a party by experts, who have compared the writing with other writings of the person, is founded on the reason that in every person's writings there is a peculiar prevailing characteristic which distinguishes it from the handwritings of every other person, and, therefore, an expert, by studying characteristics as they appear in the writings of the person, may be able to determine with some degree of certainty as to whether a writing sought to be proved contains any of the characteristics of that of which he has examined and studied. But mere perpendicular marks or scratches, used either perpendicularly or horizontally over a signature for the purpose of canceling it, do not contain the characteristics necessary in the formation of letters to enable an expert, or any person, to speak with any degree of certainty with reference to the identity of the person who made the marks.

In the case before us it is quite probable that the signature was canceled by the perpendicular marks ten years or thereabouts after the signature was written. The expert concedes this in giving the age of the ink marks over the signature, and yet, looking at the letters forming the signature made ten years before, he was allowed to give his opinion to the effect that the marks were not made by the same person who wrote the signature. This, we think, is carrying the privileges of an expert too far, and that the testimony is too dangerous and uncertain to be received as evidence and considered by either the court or jury.

The judgment of the appellate division and the decree of the surrogate's court should be reversed, and the proceedings remitted to Westchester county for a trial before a jury in the supreme court to determine whether the will in question was revoked by the testator, costs in all of the courts to abide the final award of costs.

Parker, C. J., O'Brien, Bartlett, Vann, Cullen and Werner, JJ., concur.

Judgment reversed, etc.

Revocation of Will.—If a will was in the possession of the testator at the time of his death, and is found after his death bearing upon it evidence of such acts of mutilation or obliteration as are requisite and sufficient to revoke it, its condition will be presumed the work of the testator, done with an intent to effect its revocation: See the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 351.

Experts may Give an Opinion, founded upon a comparison of hand-writings, as to the genuineness of a signature: *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; note to *Homer v. Wallis*, 6 Am. Dec. 171-173. But see *Grant v. Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739.

WEBER v. SUPREME TENT OF THE KNIGHTS OF MACCABEES OF THE WORLD.

[172 N. Y. 490, 65 N. E. 258.]

TO CONSTITUTE SUICIDE, the person must be of years of discretion and of sound mind. (p. 754.)

LIFE INSURANCE—Self-destruction.—It is an implied condition of a policy of life insurance that the insured will not purposely, when in sound mind take his own life. (p. 754.)

BENEFIT SOCIETY — Retrospective By-law—Suicide.—If a benefit society has insured a member against unintentional self-destruction after one year, it cannot, by a subsequent amendment of its by-laws, provide that self-destruction, while insane, within five years from the date of the policy shall render the policy void. (p. 755.)

James L. Quackenbush, for the appellant.

George D. Forsyth, for the respondent.

492 PARKER, C. J. The judgment in this action awards two thousand dollars to plaintiff, as beneficiary under a policy of insurance issued to her husband by defendant, a fraternal mutual benefit society organized upon the lodge plan. The defense interposed was that the insured took his own life and hence a recovery could not be had, because at the time of his death the by-laws and rules of the order provided that should an insured commit suicide within five years from the time of admission into the order, whether sane or insane, the contract should be void. At the time Weber joined the order and received his policy the rules of defendant and the contract of

insurance provided that the contract should be void if the party committed suicide within one year, whether sane or insane.

Before Weber's death defendant undertook to amend its by-laws and rules so as to extend the time from one year to five within which self-destruction, whether the result of an insane act or an intentional one, should operate to destroy the policy, and it insists the amendment was legally accomplished, and that the self-destruction of the insured within the five years, although an insane act, operated to deprive this plaintiff of all right of recovery. Plaintiff challenge the alleged amendment and insists that it was not legally accomplished, and hence is not available as a defense. But the disposition which we deem it necessary to make of this appeal renders it unnecessary to pass upon that question, and hence we shall assume, without deciding, that defendant took all the steps necessary to bring about this change in its laws.

This brings us directly to the question whether defendant had the power, by amendment long subsequent to the taking out of the policy by its member, to deprive his beneficiary of all rights under the policy in the event of unintentional self-destruction on the part of the insured, for in the eye of the law the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the Century Dictionary a suicide is defined to be: "One who commits suicide; at common law, one who, being of the years of discretion and sound mind, destroys himself." ⁴⁹³ And the act itself is defined to be, "designedly destroying one's own life. 'To constitute suicide at common law the person must be of years of discretion and of sound mind.'" This distinction was evidently in the minds of the draftsmen of the rules of the defendant, for they provided that members who should commit suicide within one year from the time of their admission, whether sane or insane, should not secure to others any benefits from the membership. It was entirely competent of course for defendant to provide in the contract between it and its members that there should be no recovery in the event that within a given period the insured should take his own life although insane, and it could as well have provided that the effect of a death by consumption should be to avoid the policy and deprive it of all force, and the same could be said of typhoid fever or any other disease; but it did not see fit to include any of those diseases not even unintentional self-destruction after a period of one year.

The query, therefore, is whether one who has become a member of this order and entered into a contract with it may be

deprived of rights under it by a subsequent amendment of the by-laws providing that unintentional self-destruction shall avoid the policy. It needs no amendment to the by-laws to accomplish that result where a person of sound mind deliberately takes his own life, for in such case, as the supreme court of the United States held in *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 18 Sup. Ct. Rep. 300, it is an implied condition of a policy that the insured will not purposely when in sound mind take his own life, but will leave the event of his death to depend upon some cause other than deliberate, willful self-destruction. So if the proof were that this defendant while of sound mind intentionally took his own life, there could be no recovery, although the policy were silent upon the subject. But unintentional self-destruction, whether due to insanity or accident, after the lapse of a year from the making of the contract, was as much insured against as death from typhoid fever or consumption, and an amendment to its by-laws providing that the death of an existing member from any of these causes ~~494~~ should render the policy void would deprive the party of vested contract rights. An amendment which effects such a result, we have recently held, may not be made because it is an unreasonable amendment destroying contract rights instead of regulating the administration of the corporation and its membership within reasonable bounds: *Parish v. New York Produce Exchange*, 169 N. Y. 34, 61 N. E. 977.

The division line between proper and improper amendments and the authorities bearing thereon were sufficiently considered in that case. In this one it suffices in conclusion to say that this defendant cannot, by amendment to its rules, deprive persons already insured or their beneficiaries of their rights under contracts of insurance in the event that death shall ensue from specified causes necessarily insured against by the original contract. This contract insured Weber against unintentional self-destruction after one year, and defendant had not the power to take away the right thus secured without his consent. As against him and the beneficiary under his contract, therefore, that part of the amendment which provided in effect that self-destruction while insane within five years from the date of the policy should render the policy void, was unreasonable and ineffectual.

The judgment should be affirmed, with costs.

Gray, O'Brien, Bartlett, Martin and Vann, JJ., concur.

Haight, J., not voting.

Judgment affirmed.

A Benefit Society may provide in its by-laws that it shall not be liable for benefits in the nature of life insurance on the death of a member by suicide, but it cannot do so by a subsequent by-law to which the insured does not assent: See *Chambers v. Knights of Macabees*, 200 Pa. St. 244, 86 Am. St. Rep. 716, 49 Atl. 784; monographic note to *Supreme Conclave etc. v. Miles*, 84 Am. St. Rep. 539-555. See the monographic note to *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706-720, on the effect of changes in the by-laws of benefit societies as against pre-existing members.

CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY v. WEAD.

[172 N. Y. 497, 65 N. E. 261.]

LIMITATIONS—Acknowledgment or New Promise.—A letter from the indorser of a note to the holder, stating his inability to pay it, but expressing a readiness to buy it if the holder will name some small sum, does not remove the bar of the statute of limitations. (p. 757.)

LIMITATIONS—Nonresidents.—Casual Temporary Visits of a nonresident to this state do not break the continuity of his absence so as to entitle him to the benefit of the statute of limitations. (p. 759.)

LIMITATIONS—Absence and Nonresidence.—There is a marked difference between the status of an absent resident and that of a nonresident, and the ability of a creditor to pursue them. (p. 760.)

George H. Yeaman and Edward M. Bassett, for the appellant.

Robert K. Waller, for the respondents.

499 CULLEN, J. The action was brought in April, 1900, against the two defendants as indorsers of a promissory note which matured February 14, 1890. Both defendants pleaded the statute of limitations. The defendant Charles K. Wead was a resident of the state at the time the cause of action accrued, and remained such until the commencement of the action. The plaintiff sought to avoid the bar of the statute by proof of the receipt of the following letter:

"251 Patent Office,

"Washington, D. C., Dec. 27, '97.

"Conn. Trust & S. D. Co., Hartford, Conn.

"Mr. M. H. Whaples, Pt.:

"Dear Sir: Several years ago when the Hartford Dynamic Co. went into insolvency you held a partly paid note of the company indorsed by me and L. C. Wead. I am not yet able to take up the note, and have no definite prospect of being able

to do so for a long time to come; but if you are disposed to name some small sum that you will take for the note I shall be glad if I can do so in justice to other interests to buy it.

"Very truly yours,

"CHARLES K. WEAD."

500 The learned trial court held that this letter was a sufficient knowledge or promise within section 395 of the Code of Civil Procedure, and directed a verdict for the plaintiff against this defendant. The appellate division, by a divided court, held the letter insufficient for the purpose, and ordered a new trial. From that order the plaintiff has appealed to this court, giving the necessary stipulation.

We agree with the view of the majority of the appellate division. At the time the defendant wrote the letter to the plaintiff the claim was outlawed by the lapse of time. "The rule with us is, that to revive a demand thus barred, there must be an express promise to pay, either absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be fairly implied": *Wakeman v. Sherman*, 9 N. Y. 85. "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it": *Manchester v. Braedner*, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405. Tested by these rules the letter plainly contains no promise to pay the note, nor does it seem to us to be the acknowledgment of an existing debt. At most it is an admission that at one time there existed a liability from the defendant to the plaintiff. But this liability was then barred by the lapse of time. There is no promise to pay the claim, but, on the contrary, an assertion that the writer was not then able to take up the note, and that he had no prospect of being able to do so. He then made a qualified offer to buy the note if the holder was willing to sell it for some small sum, and he, the debtor, could do so in justice to other interests. A comparison of the letter in this case with that found in *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383, will show how far the instrument now before us falls short of the one on which the action in the case cited was brought. Yet there it was held that the promise of the defendant was conditional.

The question presented by the nonresidence of the defendant Leslie C. Wead is not free from doubt. In April, 1890, 501 he left Malone in this state and took up his residence in Massa-

chusetts, where he has since resided. During this time he made a number of brief visits either to the city of New York or to his former residence. The statutory provisions as to the exceptions from the bar of the statute caused by nonresidence or departure from the state have been the subject of a number of alterations, at times in substance, and at other times merely in form. Section 401 of the Code of Civil Procedure before the amendment in 1888 read: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in section 430, or in subdivision 2 of section 432, of this act, remains in force." In 1888, however, the section was changed so that it thereafter read "departs from and resides without the state *and* remains continuously absent therefrom," instead of "or remains continuously absent therefrom." After this amendment it was held by this court in *Hart v. Kip*, 148 N. Y. 306, 42 N. E. 712, that to effect a suspension of the statute there must be both residence without the state and the party must be continuously absent therefrom for one year or more. So it was decided that the statute ran in favor of a defendant who was absent from the state for more than a year, but continued to be a resident. But that decision does not dispose of the present case. It does not determine the interpretation to be given to the term "absence." It must be borne in mind that before the amendment of the section this provision dealt with two different cases, one that of a defendant who might become a nonresident, the other a defendant, who, remaining a resident, might absent himself from the state for more than a year. When the section prescribed that the time of the defendant's "absence" should not be part of the ⁵⁰² time limited for the commencement of the action, such absence included two different conditions, physical absence in the case of a resident, and residence without the state in the case of a nonresident. Under a number of cases decided, it is true, not under the present code, but under earlier statutory enactments of similar character, it was clearly settled by authority that to set the statute running in the case of an absent debtor his return to the state must be "so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor"

(*Fowler v. Hunt*, 10 Johns. 464), and that successive absences could be accumulated and the aggregate deducted from the statutory period: *Burroughs v. Bloomer*, 5 Denio, 532; *Ford v. Babcock*, 2 Sand. 518; *Cole v. Jessup*, 10 N. Y. 96. *Burroughs v. Bloomer*, 5 Denio, 532, went further, and it was there held: "The expressions 'and reside out of the state' and 'the time of his absence' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of it, he was absent from the state, and accordingly, until he again became a resident of the state, the suspension of the operation of the statute continued." The case was cited with approval in *Code v. Jessup*, 10 N. Y. 96, but as authority for other propositions than the one which I have excerpted from the opinion. The doctrine quoted, however, was followed by the supreme court in the case of *McCord v. Wodhull*, 27 How. Pr. 54, and *Bassett v. Bassett*, 55 Barb. 505. In each of these cases the defendant was a resident of New Jersey, doing business in the city of New York and attending there on secular days. It was held that the statute did not run in his favor. I have found no subsequent case holding a contrary rule. The question came before this court in *Bennett v. Cook*, 43 N. Y. 537, 3 Am. Rep. 727, which was also the case of a resident of New Jersey, doing business in the city of New York, and present there during business hours. It was not, however, determined, for the court said that on no theory could the plaintiff claim a presence in the state of more than ten hours out of the twenty-four, the aggregation ⁵⁰³ of which would fall far short of the period requisite to bar the claim. *Engel v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300, does not bear on the question. There the defendant continuously resided within the state, though under a fictitious name. It seems, therefore, that at the time of the amendment of 1888, nonresidence was absence within the meaning of the statute. The change of the statute by eliminating from the exception the case of a resident of the state does not require or justify giving a different construction to the term "absence" when applied to a nonresident from that which was formerly attributed to it. By the substitution of the word "and" for "or" it became thereafter necessary to bring a nonresident within the exception of the statute that he should be continuously absent for a year or more; that is to say, a nonresidence for less than a year continuously would be insufficient for the purpose. But it did not alter the rule that nonresidence is absence, and that casual visits to the state do not destroy the continuity of the absence. In *Bassett v. Bassett*, 55 Barb. 505, it was said: "The object of the exception is

to give the plaintiff the whole of six years' residence within the state to commence his action. He is not obliged to follow the debtor into another state; nor is he called upon to watch him and ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere." We think this statement is still correct. Whether the statute runs in favor of a nonresident defendant with a place of business in this state and daily present there during business hours it is unnecessary to determine, but we hold that the casual temporary visits of a nonresident to this state do not break the continuity of his absence under the section of the code so as to entitle him to the benefit of the statute. The difference between the status of an absent resident and that of a nonresident, and the ability of a creditor to pursue them, is marked. The former, owing allegiance to the state and subject to its laws, can be reached by its process, even though it be not personally served upon him (*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129), while the state has no power to render a personal judgment against a nonresident ⁵⁰⁴ unless he be served with process within the state, and by the Code (section 1217) no judgment of any kind can be entered against a nonresident served by publication unless the plaintiff has succeeded in attaching property.

The order of the appellate division granting a new trial to the defendant Charles K. Wead should be affirmed and judgment absolute rendered for that defendant, under the plaintiff's stipulation, with costs. The judgments of the appellate division and of the trial term in favor of the defendant Leslie C. Wead should be reversed and a new trial granted, costs to abide the event.

Parker, C. J., Gray, Bartlett, Martin and Werner, JJ., concur.

Haight, J., absent.

Ordered accordingly.

Limitations.—A promise or acknowledgment relied upon to take a contract out of the statute of limitations must be a direct, distinct, unqualified, and unconditional admission of the debt, which the party is liable and willing to pay: *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67. A conditional promise to pay is not sufficient: *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799. As to the effect on the running of the statute of temporary visits to the state of an absentee or nonresident, see *Powell v. Koehler*, 52 Ohio St. 103, 49 Am. St. Rep. 705, 39 N. E. 195; *Wilson v. Daggett*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618; *Weille v. Levy*, 74 Miss. 34, 60 Am. St. Rep. 500, 20 South. 3.

VOUGHT v. EASTERN BUILDING AND LOAN ASSOCIATION.

[172 N. Y. 508, 65 N. E. 496.]

BUILDING AND LOAN ASSOCIATION.—Where the Certificates of stock issued by a building and loan association provide that the terms, conditions, and by-laws printed on the front and back thereof are made a part of the contract, they constitute, taken together, the agreement between the parties and the standard by which their rights and liabilities are to be determined. (p. 762.)

BUILDING AND LOAN ASSOCIATION.—An Absolute Promise by a building and loan association to pay the amount named in a certificate of stock, at its maturity, is not modified by other provisions of the contract that shareholders shall pay a certain monthly amount on each share until it matures, or is withdrawn, and a certain monthly installment on each share until fully paid, that the amount to be due the owners of shares shall be one hundred dollars per share, that at stated periods the profits shall be apportioned among the shares, and that no money can be drawn from the loan fund for any other purpose than to make loans and to pay withdrawing shareholders. (p. 763.)

BUILDING AND LOAN ASSOCIATION.—The Term “Withdrawing Shareholders,” in a provision of the contract with a building and loan association that no money can be drawn from the loan fund for any other purpose except to make loans and to pay withdrawing shareholders, means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterward. (p. 764.)

BUILDING AND LOAN ASSOCIATION.—If There is Any Uncertainty or Ambiguity in a contract made by a building and loan association with a shareholder, it should be resolved in favor of the latter. (p. 765.)

BUILDING AND LOAN ASSOCIATION.—In an Action by a Shareholder against a building and loan association to recover the amount of a certificate, his failure to introduce in evidence his application for membership will not prevent a recovery, if it was not a part of the contract, but preceded it, and was only mentioned as a part of the consideration therefor. (p. 767.)

A CORPORATION Cannot Avail Itself of the Defense of Ultra Vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance of the contract. (p. 767.)

Charles S. Kent, for the appellant.

Daniel A. Pierce, for the respondent.

511 MARTIN, J. This action was to recover one thousand dollars, the par or maturity value of ten shares of stock issued by the defendant, five shares to the plaintiff and five shares that were assigned to her which were originally issued to one

H. E. Newton. The contract or certificates of shares made and issued by the defendant to the plaintiff and her assignor constituted them shareholders, and provided that in consideration of the membership fee of one dollar upon each share, together with the agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of each certificate, the defendant would pay to such shareholder, or his or her executors, administrators, or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date thereof.

⁵¹² Indorsed upon each of these certificates was the name of the shareholder, his residence, and a statement that the monthly installments were three dollars and seventy-five cents. Indorsed upon the certificate issued to the plaintiff was, "Date of issue December 1, 1891. Maturity, June 1, 1898," while upon the certificate originally issued to Newton and transferred to the plaintiff was indorsed, "Date of issue October 1, 1890. Maturity, April 1, 1897." The terms and conditions referred to provided, in considerable detail, for the withdrawal of shares by a shareholder before the period of maturity, the time and method of such withdrawal, and the terms upon which it might be made.

As the defendant is a going association, and the questions here presented do not arise upon its insolvency or dissolution, it is perhaps doubtful if the articles of association are to be regarded as a part of the contract between the parties. Yet, in the consideration of this case, we shall treat them as material in determining the character and effect of the agreement and the rights of the parties under it. The certificates issued provide that the terms, conditions and by-laws printed on the front and back thereof are made a part of the contract, and, hence, taken together, they constitute the agreement between the parties and the standard by which their rights and liabilities are to be determined: *People v. Life etc. Assn.*, 150 N. Y. 94, 108, 45 N. E. 8; *Matter of Equitable etc. Assn.*, 131 N. Y. 354, 369, 30 N. E. 114.

At the threshold of this investigation we find an absolute and unqualified promise upon the part of the defendant to pay to each of the holders of the stock owned by the plaintiff the sum of one hundred dollars for each share at the end of seventy-eight months from the date of the certificate, and also an indorsement thereon of the actual time when the shares were

to mature. Therefore, as that time had expired and the required payments had been made, it is manifest that the plaintiff was entitled to recover, unless there is some other part of the contract which modifies or changes that provision.

It is contended by the respondent that such a change is ⁵¹³wrought by the other provisions contained in the terms, conditions, by-laws and articles of association, and that this agreement to pay at the expiration of seventy-eight months must, in the light of such provisions, be read and construed as an estimated, and not an actual, time of payment. Its contention is that the provisions of paragraph 1 of the terms and conditions printed upon the certificate, which provide that the shareholder shall pay seventy-five cents a month on each share until the share matures or is withdrawn; section 14 of article 14 of the by-laws, stating that all shareholders shall pay a monthly installment of seventy-five cents on each share, until the same shall be fully paid; the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of shares at maturity shall be one hundred dollars per share; the sixth paragraph of the terms and conditions, which provides that at stated periods the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing, and article 11 of the by-laws, which declares that no money can be drawn from the loan fund for any other purpose than the making of loans on security and to pay amounts due withdrawing shareholders, when given their obvious meaning, effect an utter alteration of the provision by which the defendant agreed to pay the plaintiff one hundred dollars upon each share at the expiration of the term actually designated. If such change or modification is wrought it can only be upon the ground that the provisions of the contract relied upon by the defendant are inconsistent with its promise to pay at the time named, and clearly show that the intention of the parties was that such payment should be made only in the event that upon the shares owned by the plaintiff there had been paid a sum which, together with the profits apportioned to them, would amount to the face of the shares. In other words, the defendant's contention is that those provisions were sufficient to change an absolute promise to pay into a conditional one dependent upon the success of its enterprise. We find nothing in these provisions which would ⁵¹⁴justify any such conclusion. The provision in paragraph 1 that the plaintiff should pay until the share is paid or with-

drawn is entirely consistent with the agreement for absolute payment for the shares by the defendant at the time named, as by its contract it agreed that the plaintiff's shares should mature at that time. The provision of section 14, article 14, of the by-laws obviously refers to the agreement in the certificate by which such payments were to be continued for seventy-eight months, and when payments had been made for that period clearly the shares became fully paid. The same may be said as to the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of the shares at maturity shall be one hundred dollars per share. Where shares are to be paid for by paying the sum of seventy-five cents monthly upon each for the period of seventy-eight months, and such payments have been made, it is extremely difficult to discover any theory upon which it can be properly held that such shares have not been fully paid and matured. Nor do we see how the provision for apportioning profits among the shares in any way relieved the defendant from or modified its promise to pay at the time named.

But it is further contended by the respondent that inasmuch as it is provided by article 11 of the by-laws that no money can be drawn from the loan fund for any other purpose except making loans on security and to pay amounts due withdrawing shareholders, the defendant had no authority to pay this claim because the loan fund was the only one from which such payments could be made. If that be true, and the plaintiff is not to be regarded as a withdrawing shareholder, we are unable to see how it could pay the plaintiff's claim, even if she had already paid more than the face thereof, as all the receipts of the association are divided into two classes, the loan fund and the expense fund. The latter is dedicated to, and employed in, paying the current expenses of the association, and the loan fund contains all the money received which does not go into the expense fund as therein provided. Hence, there never could be any fund from which such certificates could be paid, if **515** the contention of the respondent is correct. We think it is not. We are of the opinion that the term "withdrawing shareholders" in that connection means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterward. Any other construction would result only in absurdity, and any interpretation which would produce such a result should, if

possible, be avoided. Moreover, if the provisions relied upon to modify or change the absolute promise of the defendant to pay at the expiration of seventy-eight months are at all inconsistent with that provision, still the promise ought not to be changed or modified by any provision of the contract which is less definite and certain than the promise itself. As the contract was prepared by the defendant, if there is any uncertainty or ambiguity as to its meaning, it should be resolved in favor of the plaintiff. The defendant is responsible for it, as the language is wholly its own: *Gillet v. Bank of America*, 160 N. Y. 549, 554, 55 N. E. 292.

It is also pertinent to inquire what object the plaintiff or her assignor could possibly have had in purchasing stock, if she or he was to pay the full amount in cash, and then at the end of eleven years receive without interest only the principal which had been thus paid. Obviously, the inducement to make such purchase was that the plaintiff and her assignor were to obtain a profit by thus investing their money, as one of the avowed objects of the association was to afford its members a safe and profitable investment of their savings. When we look at the terms, conditions, by-laws and articles of association we find, among other things, that a withdrawing member is to receive six per cent upon his investment after six months and up to two years, the third year seven per cent, and after that until maturity eight per cent, and that the association may also mature any certificate after one year and issue a paid-up certificate payable at maturity, with interest at six per cent. It may also cancel any unpledged certificate, by lot, upon the payment to the owner of the amount of the installments paid thereon, together with eight ⁵¹⁶ per cent per annum as added dividend. Again, it may issue paid-up stock at the price of fifty dollars per share, payable on the date of issue, in which case, after the expiration of the time when it is to mature, the party will receive the sum of one hundred dollars. Thus, if the defendant's contention is correct, the member who withdraws before the maturity of his certificate, or whose certificate is matured by the defendant or canceled by it, or the member who purchases paid-up stock, will receive for the amount paid a much greater proportion than the shareholder who continues to the end and pays the full amount required by his certificate. These and other provisions of the contract show quite conclusively that it was not the intent of the agreement that the purchaser of shares, who paid for them in full, should receive

only the amount paid by him, without interest, but that its purpose was that the investment should be a profitable one, and in furtherance of that purpose it was that this contract was made. This, like other contracts, should be so interpreted as to carry into effect the intent and purpose of the parties in making it. Can anyone suppose for a moment that the plaintiff or her assignor, when she or he purchased this stock, with an agreement that it should mature at the end of seventy-eight months, even suspected that such maturity was to depend upon other conditions or circumstances than the expiration of the time? Obviously not. This contract must be interpreted as an agreement upon the part of the defendant to pay to the plaintiff and her assignor the amount of one hundred dollars upon each of the shares represented by the two certificates in suit at the expiration of seventy-eight months from their date and at the time indorsed upon the back thereof.

It was admitted by the pleadings, if not upon the trial, that prior to the commencement of the action the plaintiff made her proof of claim against the defendant, as required by the terms of the certificates, and that the same was rejected by it. Therefore, the plaintiff was entitled to recover the amount of the certificates in suit.

The contention of the respondent that the plaintiff should **517** not recover for the reason that the application was not introduced in evidence, cannot be upheld. While the certificate recites that "in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract," it promised to pay as therein provided, still it is obvious that the application for membership was not in fact made a part of the contract, but preceded it, and was only mentioned as a part of the consideration therefor. If there was in the application any statement or representation which might have formed a basis of defense, it should have been pleaded and proved by the defendant, and as there was no claim that the application constituted a defense, the omission of the plaintiff to introduce it in evidence cannot be regarded as a defect of proof upon her part.

The only remaining question we deem it necessary to consider arises upon the contention of the defendant that it was unauthorized by the statute under which it was organized to

make the contract in suit, and hence the plaintiff cannot recover. The defendant was organized under the provisions of chapter 122 of the Laws of 1851 and the statutes amendatory thereof and supplemental thereto. We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts ⁵¹⁸ and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power: *Bissell v. Michigan etc. R. R. Cos.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Holmes v. Willard*, 125 N. Y. 75, 80, 25 N. E. 1083; *City of Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390; *Moss v. Cohen*, 158 N. Y. 240, 249, 53 N. E. 8; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597.

Our attention has been called to several cases in the supreme court where a doctrine adverse to this decision has been held, but after a full consideration of those decisions we have reached the conclusion that they should not be followed.

It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well-established principles of law to hold it unenforceable. If it be true that the defendant cannot successfully continue its business upon the plan it has established without disregarding its contracts, or without making false or unauthorized promises to its stockholders to induce the unwary to pay their money ⁵¹⁹ to it upon contracts it does not intend to or cannot perform, no unmitigated calamity will be liable to befall the community in which its business is transacted by its suspension or by a final dissolution of the association. It is better that it should fail than it should continue to hold out false hopes to investors who may not only be deprived of their promised profits, but may ultimately lose the principal as well.

By these considerations we are led to the conclusion that the certificates upon which this action was brought had matured when it was commenced; that there was due the plaintiff thereon the sum of one thousand dollars and interest after sixty days from the presentation and rejection of the claims made under them; that the trial court improperly nonsuited the plaintiff, and that the judgments of the courts below should be reversed.

The judgments of the trial term and of the appellate division should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., and Gray, O'Brien, Vann, Cullen and Werner, JJ., concur.

Judgments reversed, etc.

The Doctrine of Ultra Vires, in its relation to the contracts of private corporations, is considered at length in the monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180. Generally speaking, a corporation cannot avail itself of the defense of ultra vires when a contract has been performed in good faith by the other party, and the corporation has had the full benefit of the performance: *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

ARRINGTON v. ARRINGTON.

[131 N. C. 143, 42 S. E. 554.]

ALIMONY—Bankruptcy.—A judgment for alimony is final, and being provable against the estate of a bankrupt, is discharged by his discharge in bankruptcy. (p. 770.)

M. Butler and J. W. Hinsdale, Jr., for the plaintiff.

F. S. Spruill and Shepherd & Shepherd, for the defendant.

143 FURCHES, C. J. This is an action brought in the superior court of Wake county to enforce the collection of alimony due the plaintiff under a decree of a court of competent jurisdiction in the state of Illinois. The plaintiff's right to recover **144** in this action is contested by the defendant upon the grounds that it appeared that the plaintiff obtained a decree for divorce a vinculo matrimonii, and alimony is not allowed by the laws of North Carolina, where this is the case; also, upon the grounds that the decree for alimony in the state of Illinois was not a final judgment, and for that reason could not be the basis of an action in this state. Defendant also pleaded the statute of limitations, and the judge of the superior court, being of the opinion that plaintiff's right of action was barred by the statute of limitations, the plaintiff submitted to a judgment of nonsuit and appealed to this court. Upon the hearing in this court it was held that plaintiff's right of action was not barred by the statute of limitations, and that the judgment sued on was a final judgment, and although alimony is not allowed in this state upon a decree of absolute divorce, that as it was admitted that it was so al-

lowed by the laws of Illinois, and as the constitution of the United States, article 4, section 1, required the courts of this state to give to the judgments of Illinois the same validity, force and effect they had in that state, this court held that plaintiff was entitled to recover upon a proper authentication of said judgment: *Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791, 37 S. E. 212.

We then held that the Illinois judgment sued on was a final judgment, and we so hold now. And as the bankrupt act provides for the proof of judgments against the bankrupt's estate, we hold that this Illinois judgment was a provable claim, and a discharge in bankruptcy is a discharge against the same.

Error.

CLARK, J., concurring. When this cause was here before (*Arrington v. Arrington*, 127 N. C. 190, 80 Am. St. Rep. 791, 37 S. E. 212), two members of the court dissented, giving as one ground of dissent that the *causa litis* being a judgment for future alimony, was interlocutory ¹⁴⁵ and an action could not be maintained thereon, citing *Lynde v. Lynde*, 162 N. Y. 418, 76 Am. St. Rep. 332, 56 N. E. 979, which has been since sustained on writ of error; *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. Rep. 555. But the majority of this court sustained plaintiff's contention that it was a final judgment, and, therefore, an action could be maintained upon it. Now that the defendant has obtained his discharge in bankruptcy, the plaintiff is again before the court contending that the Illinois judgment for alimony was not a final judgment, and hence the discharge in bankruptcy does not release defendant's liability. In view of the subsequent decision of the federal supreme court above cited, it may be said here that if this matter were before us on a rehearing, we would reverse our former decision, but that decision is the law of this case, for a rehearing is not admissible under the form of another appeal: *Perry v. Western etc. R. R. Co.*, 129 N. C. 333, 40 S. E. 191, and cases there cited.

But the plaintiff is in no wise hurt. Could we, on this second appeal, reverse our former decision and hold the Illinois judgment interlocutory, this action must be dismissed. Adhering, as we must, to that decision as the law of this case, the Illinois judgment is a final judgment, and the defendant is protected by the discharge in bankruptcy. So *quacunque via* this long litigation is at an end.

Cook, J., concurs in the concurring opinion of Clark, J.

DOUGLAS, J., concurring. I am constrained to concur in the opinion of the court, as a matter of law as well as justice, under the peculiar circumstances of this case. And yet I am not inadvertent to the cases of *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. Rep. 555, and *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735. In the former it was held (after the rendition of our former opinion in this case), on appeal from the court of appeals of New York, that the courts of that state were bound by a decree for alimony¹⁴⁶ rendered in the state of New Jersey only to the extent of the alimony therein declared to be due and payable at the rendition of the decree. The court says, on page 187: "The decree (in New Jersey) for the payment of eight thousand eight hundred and forty dollars was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond sequestration, receiver and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended upon the local statutes and practice of the state, and involved no federal question." I have quoted this paragraph because it clearly and forcibly expresses my reasons for dissenting from the former opinion of this court in the case at bar. However, this court decided that the Illinois judgment for future alimony was a final judgment, which could neither be reviewed nor modified in the courts of this state. That decision became the law of this case, and is now binding to that extent upon this court: *Setzer v. Setzer*, 129 N. C. 296, 40 S. E. 1037; *Illinois v. Illinois Cent. R. R. Co.*, 184 U. S. 77, 22 Sup. Ct. Rep. 300.

In *Audubon v. Shufeldt*, 181 U. S. 375, 21 Sup. Ct. Rep. 735, the court held that "alimony, whether in arrear at the time of an adjudication in bankruptcy, or accruing afterward, is not provable in bankruptcy, or barred by the discharge."

As this is a federal question, I would feel bound by this decision if it directly applied to the peculiar facts of the case at bar. The decision is evidently based upon the dominating idea that a decree for alimony is not a final judgment or decree. The court says, on page 577: "Generally speaking, ali-

mony may be altered by the court at any time, as the circumstances of the parties may require. The decree of a ¹⁴⁷ court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may, therefore, be there enforced by suit. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. . . . And, as the court of appeals of the District of Columbia has more than once said, 'the allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction.' " Herein lies the difference. If our former decision was correct, and it cannot now be questioned by either party to the action, the plaintiff sued upon a final judgment upon a fixed sum then due in the enforcement of which this state had no discretion whatever. Such a judgment comes clearly within the terms of the bankrupt act of 1898, which includes in section 63, among the debts which may be proved in bankruptcy, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing." If the plaintiff's Illinois judgment had not been held to be a "fixed liability," it would have been subject to review in this state, where, on grounds of public policy, no alimony is allowed upon a divorce a vinculo. In concurring in the opinion of the court, I feel that the spirit and intent of the law have been followed, albeit by a somewhat circuitous route not entirely of my own choosing.

Alimony is not a debt, so it is held in *Welty v. Welty*, 195 Ill. 335, 88 Am. St. Rep. 208, 63 N. E. 161, due from husband to wife, which may be discharged in bankruptcy, whether the alimony accrues before or after the bankruptcy proceedings.

FLANNER v. BUTLER.

[131 N. C. 151, 42 S. E. 547.]

HUSBAND AND WIFE—Gift—Resulting Trust.—If money is deposited in bank by a husband in the name of his wife, and land is thereafter purchased therewith and conveyance made to her, it becomes her separate property, with no resulting trust in his favor. (p. 774.)

Bellamy & Peschau, Rountree & Carr, and Stevens, Beasley & Weeks, for the plaintiff.

E. S. Martin, for the defendants.

¹⁵² FURCHES, C. J. This is an action to have defendant Carrie Butler declared trustee of two pieces of property in the city of Wilmington, known as the "Front street property" and "the Dock street property," for the benefit of the plaintiff. The trial resulted in a verdict and judgment in favor of the plaintiff for the "Front street property" and a judgment for the defendant as to the "Dock street property," and both plaintiff and defendant appealed.

At the conclusion of the evidence, the defendants moved to nonsuit plaintiff upon the ground that he had not made a prima facie case, taking all the evidence to be true and viewing it in the most favorable light for the plaintiff. The court refused this motion as to the "Front street property," but allowed it as to the "Dock street property." To this ruling of the court dismissing his action as to the "Dock street property," the plaintiff excepted, and this exception presents the only question made by the plaintiff's appeal.

The plaintiff and the defendant Carrie were married in 1885, and were husband and wife when the property in controversy was purchased. But since then the plaintiff and defendant Carrie have been divorced, and the defendant Carrie has intermarried with Henry W. Butler, her codefendant Carrie. The defendant Carrie testified that when she was married she had no estate, and that the money used in buying the property came from the plaintiff Flanner. But it appears from the testimony of the defendant Carrie, and from that of the plaintiff (and not contradicted by any evidence), that the plaintiff, some time after his marriage, became a member of a partnership composed of his father in law, Larkin, his brother in law, Alderman, and himself; that ¹⁵³ a large amount of money belonging to the plaintiff was used in this partnership, which

soon became insolvent, and was compelled to make a general assignment.

The plaintiff testified that when he discovered the partnership was insolvent, "in order to save something from the wreck," he procured the execution of notes, payable to his wife, to the amount of six thousand dollars, which notes were given a preference in the assignment, and were paid in full by the assignee Davis; that these notes were deposited in bank to the credit of the defendant Carrie, and, when paid, the money was deposited to her credit; that the plaintiff received about three thousand dollars from other sources, which was also deposited in bank to her credit. This money was used in buying and improving the "Dock street property," and a deed therefor made to the defendant Carrie, with the plaintiff's knowledge and consent.

There has been some discussion as to the possession, whether it was in the plaintiff or the defendant, but we do not think that question is raised by the evidence in this appeal, as neither was ever in the actual possession of the property—it being rented by common consent of the parties, and sometimes one collecting the rent and sometimes the other. But the general rule is that possession is presumed to be in the owner, where there is nothing to show to the contrary (*Gaylord v. Respass*, 92 N. C. 553), but this is not always the case, as between husband and wife: *Faggart v. Bost*, 122 N. C. 517, 29 S. E. 833.

If this property had been bought with the plaintiff's money, and the deed made to his wife with his knowledge and consent, it would not have created a resulting trust in the plaintiff: *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. But in this case the land was bought with the money of the defendant Carrie, as the plaintiff had procured the notes for six thousand dollars to be made payable to her, and deposited them in bank to her credit; and when they were paid, the money was deposited ¹⁵⁴ in bank to her credit. This constituted a gift by the plaintiff to the defendant Carrie and the money became hers: *Hairston v. Glenn*, 120 N. C. 341, 27 S. E. 32. The other three thousand dollars the plaintiff deposited in bank to the credit of defendant Carrie, was a gift, and became her money for the same reason and upon the same authority as the other six thousand dollars.

It seems from the evidence that the plaintiff usually collected the rents, until the defendant Henry informed the defendant Carrie that she could control the property, and she at once wrote to the tenants to pay no more rents to the plain-

tiff, and, as soon thereafter as she could procure the money to do so, she went to South Dakota, where she procured a divorce from the plaintiff, and, not long after procuring the divorce, she married her codefendant, Henry.

It seems by these manipulations the plaintiff lost his money and his wife, and we are unable to see any legal remedy he has to regain them. The fact that he gave his money to his wife to defraud his creditors will hardly afford him any comfort. But the fact that he also lost his wife may be some consolation to him.

Affirmed.

Resulting Trusts are considered in the monographic note to Neill v. Keese, 51 Am. Dec. 751-760. Where the purchase price of realty is paid by a husband, and the legal title is taken in the name of his wife, a resulting trust does not ordinarily arise, the presumption being that the conveyance was intended as an advancement: Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; Case v. Espenschild, 169 Mo. 215, ante, p. 633, 69 S. W. 276.

SPRINGS v. PHARR.

[131 N. C. 191, 42 S. E. 590.]

JUDGMENT—Merger of in Judgment.—If a judgment creditor brings an action on his judgment constituting a lien on the debtor's homestead, and obtains a new judgment, the first judgment is not merged in the second so as to destroy the priority of the first. (p. 777.)

Clarkson & Duls, for the plaintiff.

Burwell, Walker & Cansler, for the defendants.

191 CLARK, J. The plaintiff's judgment was docketed December 22, 1888. The defendants, Berryhill & Son, obtained their judgment before justice of the peace, and docketed ¹⁹² same December 19, 1888. They obtained a judgment upon said judgment, and docketed same December 2, 1895. The homestead of the defendant in the above judgment had been laid off December 3, 1888. Said homesteader having died since said second judgment, the defendant Pharr, his administrator, sold the homestead under a decree to make assets, and the proceeds being insufficient to pay both above-named judgments, this action is submitted without controversy, under the Code, sec-

tion 567. The plaintiff contends that, by obtaining the second judgment, Berryhill & Son lost the priority to which their first judgment was entitled, that there was a merger, and that the Berryhill judgment has rank only from the date of the second judgment in 1895.

In *Andrews v. Smith*, 9 Wend. 53, Savage, C. J., says: "The only question in this case is whether a judgment before a justice, rendered upon a judgment before another justice extinguishes the judgment first obtained. As to judgments in courts of record, this question has been settled in the negative: *Jackson v. Shaffer*, 11 Johns. 517, and cases there cited; *Doty v. Russell*, 5 Wend. 129; *Harvey v. Wood*, 5 Wend. 222. The general principle of law governing in cases of this kind, and which applies to all securities, is, that a security of a *higher* nature extinguishes *inferior* securities, but not securities of an *equal* decree." (The italics are in the original.) To same purport, *Munford v. Stocker*, 1 Cow. 178; *Preston v. Per-ton*, Cro. Eliz. 817, cited in *Weeks v. Pearson*, 5 N. H. 324; *Griswold v. Hill*, 2 Paine, 492, Fed. Cas. No. 5836; which seem to us sustained by the reason of the thing, as tersely stated by Savage, C. J., above. The contrary view is taken in *Purdy v. Doyle*, 1 Paige, 558, and *Gould v. Hayden*, 63 Ind. 443. These last have been followed by 17 American and English Encyclopedia of Law, 2d ed., 808, and 20 American and English Encyclopedia of Law, 600, but the weight of the authorities (which are very few, the above embracing all directly in point, except the one below quoted) and the reason of the thing, as we have said, is the other way.

¹⁹³ *Lawton v. Perry* (1893), 40 S. C. 255, 18 S. E. 861, is a case "on all-fours." There, a judgment was obtained in 1867; in 1871, the debtor made a payment thereon; after his death, the creditor not proceeding to revive the judgment (as he could have done) brought instead an action on the former judgment and obtained judgment thereon in 1889; held, that the old judgment of 1867, acknowledged by the payment in 1871 (and therefore not presumed to be paid until 1891) was not so merged in the judgment of 1889 as to deprive the latter judgment of its original lien of 1867 on all the property of the then living judgment debtor. In the present case, the Berryhill judgment, docketed December 19, 1888, had not lost its lien on the homestead, notwithstanding the lapse of seven years: Laws 1885, c. 359: see Clark's Code, 3d ed., p. 677, note. In the above case of *Lawton v. Perry*, 40 S. C.

274, 275, 18 S. E. 869, it is said: "Usually it happens that the cause of action is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment. This is not universally the case, however. . . . So far as dignity or rank as between the judgments (that of 1867 and 1889), they were the equal, one of the other, for each was a judgment. There was, therefore, no new dignity created. Would it not be a hardship to declare this judgment obtained in 1889 to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule."

We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a cause of action is merged in the judgment. Here, by virtue of the act of 1885, the justice's judgment, when docketed, remained a lien on the homestead after the lapse of ten years, but would lose its validity as to any other property after ten years (*McDonald v. Dickson*, 194 85 N. C. 248), and could not be sued on after seven years: *Daniel v. Laughlin*, 87 N. C. 433. Is there any reason why the judgment creditor can only keep it alive and enforceable as to subsequently acquired property outside of the homestead by paying as a penalty the surrender of the priority of lien which he holds (*Jones v. Britton*, 102 N. C. 166, 9 S. E. 554) on the homestead under the first judgment? We know of none, and there is no precedent in this state to that effect. Indeed, our only precedent is in complete accord with what we have said above, and is decisive of this case.

In *McLean v. McLean*, 90 N. C., at pages 531 and 533. Smith, C. J., says: "Assuming that the recovered judgment is but a renewal of the first, the one being the sole cause of action, we see no reason why both may not subsist and remain in force as separate securities for the same debt, with the advantages incident to each retained. It is not correct to say that one extinguishes the obligation contained in the other, and that the plaintiff's remedy must be sought only in the last. As soon as one judgment is entered, the plaintiff may take out execution, and at the same time bring another action upon the judgment, as itself a cause of action. This is clearly involved in the decision, if not directly decided in *Carter v. Colman*, 34 N. C. 274. It may be that liens on land have been acquired since the rendition of the first and prior to the last

recovery; and if so, the plaintiff ought to be at liberty to revive and sue out remedial writs on the oldest."

Affirmed.

MERGER OF JUDGMENT IN JUDGMENT.

Although the cases are somewhat meager and in conflict, we believe the true rule to be that "a judgment is extinguished when, being used as a cause of action, it grows into another judgment": 1 Freeman on Judgments, 4th ed., 216. This is the doctrine sanctioned by the modern and best reasoned authorities: *Garvin v. Garvin*, 27 S. C. 472, 477, 4 S. E. 148; *Lawton v. Perry*, 40 S. C. 255-265, 18 S. E. 861. This was the view adopted in *Gould v. Hayden*, 63 Ind. 443, where it was decided that a judgment thus recovered upon a judgment merges the latter in the former, and that all its liens and priorities are released. In this case it was also determined that if a judgment is recovered in a court of competent jurisdiction in another state upon a judgment previously rendered in Indiana, the latter is merged in the former, and that all of its liens and priorities upon lands in the latter state are abandoned, and that the owner of such lands may enjoin their sale upon execution issued thereon. The court said: "We are aware that there are respectable authorities which are in conflict with our conclusion in this case. But it has seemed to us, after a careful consideration of the main question involved, that our decision thereof is in harmony with, and supported by, the weight of modern authority, that it is just and right in principle, and that, as a rule of law, it will best subserve and protect the rights of all parties": *Gould v. Hayden*, 63 Ind. 450. The court also said: "If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it cannot be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon. This is so without regard to the dignity of the courts in which the respective judgments may have been rendered": *Gould v. Hayden*, 63 Ind. 449. In the late and well-reasoned case of *Price v. First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637, it was determined that, if a judgment is recovered upon a prior judgment, the latter is merged in the former, and all of its liens and priorities are released. Also that a second judgment upon the same cause of action as a prior judgment, although for a less amount, is a waiver of the balance, and an absolute extinguishment of the first judgment. This rule is only in keeping with a number of other authorities, as that, if a creditor has obtained a lien upon real estate by a judgment at law, and subsequently brings an action of debt on his judgment, and recovers a new judgment, he will lose his first lien: *Purdy v. Doyle*,

1 Paige, 558. And that if two judgments of the same purport are rendered in the same case between the same parties, for the same cause, at the same term of court, the first judgment must be regarded as merged in the second, or constructively vacated by it, as there can be no reason for preserving the first judgment: *Johnson v. Hesser*, 61 Neb. 631-634, 85 N. W. 894. In *Planters' Bank v. Calvit*, 3 Smedes & M. 143, 41 Am. Dec. 616, it was truly held that, although plaintiff might have two judgments at the same time for the same cause of action, he could not have two productive judgments nor executions of both for the same cause of action. He can have but one satisfaction.

If the law provides that, after levy of execution issued on a judgment against personal property, the debtor may give a forthcoming bond, which if forfeited shall have the force and effect of a judgment, and that execution may issue against all of the obligors thereon, "the original judgment is merged and satisfied by the new and more comprehensive statutory judgment upon the bond": *Brown v. Clark*, 4 How. (U. S.) 4-13. It has been held in many other cases that a statutory judgment upon a forfeited delivery bond merges and extinguishes the original judgment: *Smiser v. Robertson*, 16 Ark. 599; *Frazier v. McGueen*, 20 Ark. 68; *Neale v. Jeter*, 20 Ark. 98; *Bank of United States v. Patton*, 5 How. (Miss.) 200, 35 Am. Dec. 428. "It is like a second judgment obtained in an action on the first; the plaintiff cannot proceed to enforce the first, but must rely upon the second": *McNutt v. Wilcox*, 3 How. (U. S.) 419; *Whiting v. Beebe*, 12 Ark. 549. The execution and forfeiture of a delivery bond for property, having the force and effect of a judgment, discharges or extinguishes the original judgment, and no execution can thereafter go upon the latter: *Chitty v. Glenn*, 3 T. B. Mon. 425. It has also been decided that if a new judgment is recovered upon prior judgments, as in an action for debt for an amount equal to both such prior unsatisfied judgments and costs to date, they are merged in the later judgment; and the judgment lien under them upon the land of the defendant is thereby discharged: *Denegre v. Hann*, 13 Iowa, 240. It has also been decided that if a person brings an action on a judgment, which never was a lien on the land of the judgment debtor, against the heirs of the latter after his decease, instead of bringing an action to revive the judgment, and obtains a new judgment, making it a lien on the land of the deceased, the old judgment is merged in the new, and he is entitled to rank only as a creditor of the estate holding a debt of record: *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861.

If a judgment of a lower court is appealed from, and affirmed on appeal, the lower judgment is merged in the judgment of the supreme court upon its affirmance in that court: *Wilson v. Isbell*, 45 Ala. 142. This has been denied in *Planters' Bank v. Calvit*, 3 Smedes & M. 143, 41 Am. Dec. 616, where it was held that a judgment of affirmance

by an appellate court does not satisfy, merge, or extinguish the judgment below, and that it retains its lien. If two judgments are obtained in different courts, involving the same parties and the same cause of action, the satisfaction of either one merges and extinguishes the other: *Wheelock v. Godfrey* (Cal.), 35 Pac. 316; *Tarver v. Rankin*, 3 Ga. 210; *Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846.

On the other hand, quite a number of cases, proceeding upon the theory that no merger can take place until some higher remedy or evidence has been created, deny that one judgment can merge into another of equal degree: *Weeks v. Pearson*, 5 N. H. 324; *Jackson v. Shaffer*, 11 Johns. 513; *Armour Bros. Banking Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100. It has been held that a justice's judgment is not merged in a judgment obtained upon it in another justice's court, the general principle governing in such cases being that a security of a higher nature extinguishes an inferior security, but not a security of equal degree: *Andrews v. Smith*, 9 Wend. 53. Upon this ground a motion to enter satisfaction of a judgment because it had been recovered upon in another action has been denied, the court holding that a judgment is not merged or satisfied by another judgment being obtained in another court in an action brought upon the first judgment. The second judgment must in fact be satisfied to extinguish the first judgment: *Weeks v. Pearson*, 5 N. H. 324; *Mumford v. Stocker*, 1 Cow. 178; *Griswold v. Hill*, 2 Paine C. C. 492, Fed. Cas. No. 5836; *Armour Bros. Banking Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100. It has also been decided that an original judgment is not merged or destroyed by a judgment of supersedeas. That the plaintiff may pursue his remedy at his option, either on the original or the supersedeas judgment, the only restraint being that the satisfaction of one judgment extinguishes the other: *Smith v. Anderson*, 18 Md. 520. Also that if a personal judgment is against an administrator, and then a judgment is recovered on such judgment on his bond, for the same debt, the two judgments are not merged. Each is a separate security for the same debt, but the payment of one extinguishes the other: *Townsend v. Whitney*, 75 N. Y. 425; *McLean v. McLean*, 90 N. C. 530. It has also been held that if a judgment is rendered against a husband for goods purchased, part of which are household necessities, a judgment against the wife's statutory estate for the value of such necessities does not merge the judgment against the husband as to such necessities, but is merely auxiliary to its collection, and operates as a payment only when and to the extent it is made available: *Roberts v. Rice*, 71 Ala. 187. In *Price v. Higgins*, 1 Litt. (Ky.) it was decided that if a judgment is obtained against a defendant in attachment, and afterward judgment is rendered for the whole amount against the garnishee, the latter judgment does not extinguish the former. And in *Collier v. Bank of Newbern*, 17 N. C. 525, that an unsatisfied judgment against a sheriff and his sureties for the amount of an execu-

tion delivered to him for collection does not merge or extinguish the judgment on which the execution issued. Or the payment of a judgment against a sheriff for neglect, to make the money under an execution, will not of itself operate as a merger or satisfaction of the original judgment: *Poe v. Dorrah*, 20 Ala. 288, 56 Am. Dec. 196. If in an action on a judgment constituting the only lien on the estate of a debtor at the time of his death, a new judgment is obtained against his heirs, the first judgment, it has been held, is not merged in the second, so as to let in subsequent creditors under judgments, to rank equally with the prior judgment creditor in the distribution of the assets of the original debtor's estate: *Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861. If the statute law for preserving the life of a judgment is followed, and a new judgment is obtained on the old one, the old judgment, it has been decided, is not merged in the new one. The lien of the old judgment is not thereby lost, and the lien of the new one dates from the time of the old judgment, and takes priority from that date: *Hay v. Alexandria etc. R. R. Co.*, 20 Fed. 15.

DAVIS v. SUMMERFIELD.

[131 N. C. 352, 42 S. E. 818.]

LATERAL SUPPORT—Notice of Nature of Excavations.—It is negligence to excavate by the side of an adjoining owner's wall, and especially to excavate deeper than the foundation of such wall, without giving him notice of the nature of and of the intent to make the proposed excavation. (p. 782.)

Boone, Bryant & Biggs, for the plaintiff.

Winston & Fuller, for the defendants.

353 CLARK, J. This is an action for damages caused by depriving the soil under plaintiff's wall of its lateral support, by negligence of the defendant while excavating for a new building on an adjoining lot. The right to lateral support has been before this court in *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753, and the whole subject is discussed in the very full and elaborate notes to *Larson v. Metropolitan Street Ry. Co.*, 33 Am. St. Rep. 416, 447, 16 L. R. A. 330. Another full consideration may be found in *Jones on Easements*, sections 585-631. There was evidence that the defendant made his excavation two feet deeper than the bottom of the foundation of the plaintiff's wall, causing it to crack and otherwise injuring the plaintiff's building. There was counter-evidence, and the

jury as triers of the fact found a verdict for the plaintiff and assessed his damages at two hundred and twenty-five dollars.

The exceptions presented on the appeal are very numerous, and were very fully and ably argued here, as doubtless they also were below. After careful consideration, we find no material error. The only new point or proposition not heretofore decided, and the point perhaps most pressed on the argument, is the following instruction to which the defendant excepted: "While there is evidence that the plaintiff knew that the defendant was going to excavate and build, for she testified to that herself, still the defendant owed to her the duty, which is not an unreasonable one, to tell her of the extent of his proposed plan so she might adopt measures for self-protection, if she chose to do so, and the court charges you there is no evidence that he gave proper notice to the plaintiff on the line above indicated. To give this notice involves no expense to the proprietor, and affords opportunity to the adjoining owner to protect his rights for improvements made by one proprietor may be attended with disastrous results, even when prosecuted by competent workmen." We see nothing unreasonable or erroneous in this instruction. ³⁵⁴ So far from giving such notice, when the plaintiff sent over an employé, who said to the male defendant, "Mrs. Davis says please protect her wall, to dig it out in sections," he replied, "I know my business; let her attend to her business." And when in her anxiety about the safety of her building, the plaintiff sent over another person to ask of her defendant "not to hurt her wall," asking that the work might be prosecuted in such a manner as not to endanger her building, the defendant very ungallantly sent the lady back word, "To go to the devil."

The action is not for the defendant's rude speeches, it is true, but certainly after these messages from the plaintiff, showing her anxiety to protect her wall, he at least owed to her, as his honor charged, to give her notice of the manner and depth of his proposed excavations. If informed in that respect she might have placed supports under her wall, or removed weights from the floors or otherwise protected her property; or if plaintiff's plans seemed an illegal invasion of her rights, she might, if so advised by counsel learned in law, have sought protection by an application for an injunction. The defendant's failure to give such notice and information was, under the circumstances, as injurious to the plaintiff as the manner of his refusal was wanting in credit to him-

self: Jones on Easements, sec. 610; Spohn v. Dives, 174 Pa. St. 474, 34 Atl. 192; note to Larson v. Metropolitan Street Ry. Co., 33 Am. St. Rep. 470.

The true rule deducible from the authorities seems to be that, while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention ³⁵⁵ that he may underpin or shore up his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence.

Upon the whole case substantial justice appears to have been done, and we find no error requiring a new trial.

Affirmed.

The Right to Lateral Support is considered in Mosier v. Oregon Nav. Co., 39 Or. 256, 87 Am. St. Rep. 652, 64 Pac. 453; monographic notes to Larson v. Metropolitan St. Ry. Co., 33 Am. St. Rep. 446-476; Charles v. Rankin, 66 Am. Dec. 647-651; Thurston v. Hancock, 7 Am. Dec. 62-66. One making an excavation on his own land, and thereby causing injury to an adjoining owner's building, without giving him previous notice or without his knowledge, is liable in damages: Schultz v. Byers, 53 N. J. L. 442, 26 Am. St. Rep. 435, 22 Atl. 514.

SMITH v. PATTON.

[131 N. C. 396, 42 S. E. 849.]

PUBLIC OFFICERS—*Liability on Official Bond.*—A clerk of court is a public officer, and, as such, his sureties are liable for money received by him in his official capacity as an insurer, and not merely for the exercise of good faith. (p. 784.)

OFFICIAL BONDS.—*Liability on.*—If a public officer receives money in his official capacity, whether authorized or required to receive it or not, his sureties on his official bond are responsible for the safekeeping of the fund so paid in. (p. 784.)

J. T. Perkins, for the plaintiffs.

A. C. Avery, for the defendants.

³⁹⁷ CLARK, J. Under proceedings to sell land for partition, the commissioner paid the proceeds of the sale into the clerk's office, taking his receipt therefor as clerk. The clerk deposited the same in the Piedmont Bank, which later failed, and the fund being impaired or lost, this action is to recover the amount so lost from the clerk, on his bond.

It is settled in this state that the bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith: *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897; *State v. Bateman*, 102 N. C. 52, 11 Am. St. Rep. 708, 8 S. E. 882; *Morgan v. Smith*, 95 N. C. 396; *Havens v. Latham*, 75 N. C. 505; *State v. Clarke*, 73 N. C. 257, and other cases therein cited. Bonds of administrators, executors, guardians, etc., only guarantee good faith: *Moore v. Eure*, 101 N. C. 11, 9 Am. St. Rep. 17, 7 S. E. 471; *Atkinson v. Whitehead*, 66 N. C. 296.

But the defendants contend that there was no law authorizing the clerk to receive these funds, and therefore the bond is not liable. Here, the clerk appointed the commissioner to make the sale, without bond, and on approving his report received and receipted for the proceeds as clerk, took out his costs, and entered the amount due each heir at law on his docket, and disbursed a portion of said fund to the parties entitled. This would seem a receipt of the fund by the clerk "by virtue of his office": *Cox v. Blair*, 76 N. C. 78; *McNeill v. Morrison*, 63 N. C. 508; *Judges v. Dean*, 9 N. C. 93.

But if this were otherwise, the clerk received it "as ³⁹⁸ clerk," and so receipted for it. This was certainly a receipt of the money "under color of his office," and, indeed, this is admitted in the answer. The older decisions were made when these words were not in the statute. "The broad and comprehensive provision" embracing money received by "color of his office," was enacted to cover the defect by the Code, section 72, and was construed in *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520, to embrace all cases where the officer received the money in his official capacity, but when he may not be authorized or required to receive the same. In such case, the bond is responsible for the safe custody of the fund so paid in: *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897; *Sharp v. Connelly*, 105 N. C. 87, 11 S. E. 177; *Thomas v. Connelly*,

104 N. C. 342, 10 S. E. 520; Ex parte Cassidy, 95 N. C. 225; Brown v. Coble, 76 N. C. 393; Greenlee v. Sudderth, 65 N. C. 473; Broughton v. Haywood, 61 N. C. 380.

While the charter of the Piedmont Bank (Private Laws of 1891, chapter 41, section 2) authorizes public officers to deposit in said bank any moneys in their custody, it specifies that this shall be subject to the provisions of chapter 470 of the Laws of 1889, which provides that no such provision in any corporation charter "shall operate or be construed to relieve them from official responsibility, or their sureties from liability on their official bonds."

The plaintiffs' claimants of this fund, are entitled to maintain this action: Code, sec. 1883; Daniel v. Grizzard, 117 N. C. 105, 23 S. E. 93.

No error.

The Liability of Sureties on the bond of a clerk of court is considered in the monographic note to Feller v. Gates, 91 Am. St. Rep. 562-571.

COMMISSIONERS OF McDOWELL COUNTY v. NICHOLS.

[131 N. C. 501, 42 S. E. 938.]

SURETYSHIP—Separate Indemnity.—A person who is about to become a surety with others may stipulate with the principal, without the knowledge of other sureties, for a separate indemnity for his benefit alone. (p. 786.)

SURETYSHIP — Separate Indemnity—Contribution.—If one surety, subsequently to becoming such, obtains from the principal a separate indemnity or counter-security, it inures to the benefit of all. (p. 787.)

S. J. Erwin, for the plaintiff.

J. T. Perkins, for the defendant.

502 MONTGOMERY, J. The defendant, R. L. Nichols, as sheriff of McDowell county, executed two bonds to the state of North Carolina, conditioned for the collection and settlement of all the public taxes. One of the bonds was dated the 31st of August, 1899, and the other one was dated the 31st of August, 1900. Both bonds covered one and the same term of office, and certain of the other defendants executed the first bond as sureties, and certain of the other defendants

executed the second bond. Nichols, the sheriff, made default in the settlement of the first year's taxes, and was in default at the time of the execution of the second bond—the renewal bond. The commissioners of the county brought suit for the amount of the deficiency against the sureties on both bonds. The pleadings having been filed, the cause was referred to Edmund Jones to take and state an account of the questions of law and fact arising upon the pleadings. The sureties on the last bond, that of 1890, raised no question as to their liability equally with the sureties on the first bond in their answer. The referee decided that they, as a matter of law, were so bound, and no exception was entered: *Poole v. Cox*, 31 N. C. 69, 49 Am. Dec. 410; *Oats v. Bryan*, 14 N. C. 451; *Coffield v. McNeill*, 74 N. C. 535. It appeared before the referee that, on the thirty-first day of August, 1899, Nichols, the sheriff, executed a deed of trust to D. E. Hudgins, as trustee, to indemnify W. A. Conley, one of the sureties ⁵⁰³ on the bond of 1899, against loss on account of his liability as bondsman, and that Conley refused to sign the bond until the indemnity had been given; that he signed it on the 5th of September, 1899, when the commissioners received and approved it, and that the bond had been signed by the other sureties on the last mentioned date. There was no evidence that the sureties had any knowledge of the indemnity given to Conley at the time it was given, or before they had executed the bond. The amount realized from the sale of the property by Hudgins, trustee, was two thousand six hundred and fourteen dollars and fifty-nine cents, which has been paid to the plaintiffs. In adjusting the liabilities of the cosureties amongst themselves, the referee held, as a matter of law, that each of them on both the bonds was entitled to share in the benefit of the payments made by the trustee, upon his payment of his proportionate part of the recovery against the principal and sureties. The defendant Conley excepted to that finding of the referee, and, upon the confirmation of the report by the court, he entered the same exception.

The doctrine of contribution among cosureties does not arise by contract between them, but it grows out of an equitable principle—the principle that equality is equity among persons who stand in the same situation. Does the defendant Conley stand in the same situation as do the other cosureties? If he does not, then the principle above stated does not apply, “for equality among persons whose situations are not equal is

not equity." Do Conley and the other sureties, then, occupy the same and equal situation? The answer to the question depends upon whether or not one who is about to become a surety with others can stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit, primarily. We believe it can be done, and that it cannot be reached and applied to the equal benefit of all the sureties, unless it was procured through fraud, or ⁵⁰⁴ unless it can be shown that although it was executed for the benefit of one alone, yet it was intended for the benefit of all. The true principle underlying this question is stated with great clearness in the case of *Hall v. Robinson*, 30 N. C. 56, where the court said: "The relief between cosureties in equity proceeds upon the maxim that equality is equity; and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it inures to the benefit of all. The risk and the relief ought to be coextensive." And in each and all of the cases in our reports (and they are numerous) where the principle is upheld and the indemnity applied to the common benefit of all the sureties, the indemnity was procured subsequently to the execution of the obligation. In the case before us, the risk was never a common one between Conley and the other sureties. Before he had any relation or connection with the other sureties, and before he would assume any responsibility, he stipulated with the principal for a separate indemnity. When Conley signed the bond, he had already stipulated for separate indemnity; and the other sureties have no right to complain of an act of precaution which they might have availed themselves of and to reach the benefit of that indemnity, provided it was executed in good faith, or unless they showed that it was intended for the benefit of all, which they could have shown, if it had been true, in an equitable proceeding as this was. The equitable doctrine ought not to be extended so far as to reach the matter of indemnity stipulated for before the relation of cosurety exists. Until that relation is brought about, the sureties have each the right to look out for his own separate indemnity; afterward, the procuring of indemnity is and ought to be for the common benefit, on the principle mentioned ⁵⁰⁵ in this opinion. And this has been decided by this

court in the case of *Long v. Barrett*, 38 N. C. 631. Ruffin, C. J., for the court, there said: "As one, when he is about to become a surety with others may stipulate for a separate indemnity from the principal to him, and the cosureties would be only entitled to a surplus after his reimbursement: *Moore v. Moore*, 11 N. C. 358, 15 Am. Dec. 523. So there can be no doubt that after two persons have become sureties for a common principal, they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal, or for contribution from another cosurety."

Error.

If One of Several Sureties subsequently takes a security from a third person or the principal for his own indemnity, it inures to the common benefit of all the sureties: Note to *Hall v. Cushman*, 43 Am. Dec. 563-565; *Bolln v. Metcalf*, 6 Wyo. 1, 71 Am. St. Rep. 898, 42 Pac. 12, 44 Pac. 694; *Hoover v. Mowrer*, 84 Iowa, 43, 35 Am. St. Rep. 293, 50 N. W. 62.

GREEN v. GREEN.

[131 N. C. 533, 42 S. E. 954.]

DIVORCE AND ALIMONY—Ground for.—An offer by a husband to strike his wife, coupled with foul and unjust accusations often repeated, a withdrawal of intercourse, refusal to bed with her, and an express charge of the illegitimacy of the children of the marriage, is ground for a divorce from bed and board, with alimony for the support of the wife. (p. 789.)

DIVORCE.—Evidence of the acts of the husband within six months before the commencement of an action for divorce by his wife is incompetent and inadmissible. (p. 790.)

W. E. Moore, for the plaintiff.

C. C. Cowan, for the defendant.

534 CLARK, J. This is an action for divorce from bed and board. The complaint alleges, in substance, that on or about September 4, 1900, the defendant cursed and abused the plaintiff, drawing back his fists to strike her (which plaintiff avoided by stepping back), and told her to leave his house, that he did not respect or love her, and this in the presence

of a neighbor, and states her conduct to show that she did not provoke it; that the defendant was jealous, and if she spoke to any man or went to any neighbor's house, the defendant would get mad and would not speak to her for several days, and that she did nothing to cause jealousy, stating her conduct; that for at least six months prior to September 4, 1900, the day the plaintiff was driven from the defendant's house, he had slept in the storehouse, and refused to stay in the dwelling-house and sleep with this affiant, though she had often begged him so to do, and had withdrawn during that time all marital intercourse from the plaintiff, and had denied his being father of their children; whereupon, she avers that such indignities have rendered her condition intolerable and life burdensome: Code, sec. 1286.

The plaintiff testified that she was twenty-five years old, and the defendant fifty-nine; that they had been married six years and had two children, and testified somewhat more in detail to the state of facts above set out, and introduced, without objection, a long letter from the defendant, written in November, 1900, soon after the separation, in which, among other insulting things, he repeats that the children are not his, and charges that they were begotten by the plaintiff's uncle. Upon demurrer ⁵³⁵ to the evidence, the court gave judgment of nonsuit. In this there was error.

In *Coble v. Coble*, 55 N. C. 392, it is said that it is not necessary that, to render the plaintiff's condition intolerable and life burdensome, there should be a striking, or even a touching of the body, but foul and unjust accusations often repeated, with a withdrawal of intercourse and refusing to bed with his wife, and (in that case) threats of deadly violence, were sufficient. Here, we have all these except the last, and in addition we have, here, the offer to strike and the express charge of the illegitimacy of the children. Would it be reasonable, should these facts be sustained by a verdict, to compel the plaintiff to again bed and board with the defendant by refusing a judicial separation and alimony for her support? The defendant, according to the allegation and evidence, has already given himself such separation from bed and board by abandoning the plaintiff, living separate and apart from her, and refusing conjugal relations, and it appears is defending this action simply to avoid contributing to her support. In *Erwin v. Erwin*, 57 N. C. 82, the facts were almost identical with those in this case.

The complaint states the circumstances specifically, giving time and place, as required: *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822, and *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190, and numerous cases cited therein; also specifically her conduct on the occasions referred to, that it may be seen that her allegation that there was "no provocation on her part," was not a conclusion of law or fact drawn by herself: *Jackson v. Jackson*, 105 N. C. 438, 11 S. E. 175, and cases there cited, and *O'Connor v. O'Connor*, 109 N. C. 139, 13 S. E. 887. The answer denies the allegations of the complaint, but sets up no counter-allegations of conduct on the part of the plaintiff in bar of a divorce, notwithstanding the complaint.

The letter of November, 1900, it is true, was written within ⁵³⁶ six months of bringing the action, and it may be (which we do not decide) should have been ruled out if excepted to; but it was only a reiteration of what was already in evidence, save the charge that the plaintiff's uncle was specifically named as the father of the children, whose paternity he had before disclaimed, according to the plaintiff's evidence. This additional indignity having been within six months before action brought, was clearly incompetent, and that part of the letter should have been excluded by the court *ex mero motu*, but in withholding the case from the jury there was error.

A Divorce may be granted a wife on the ground that her husband indulged in profane, indecent, and insulting language toward her, charging her with unchastity and denying the paternity of his children: *Braun v. Braun*, 194 Pa. St. 287, 75 Am. St. Rep. 699, 44 Atl. 1696; monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 75-80. But see *Maddox v. Maddox*, 189 Ill. 152, 82 Am. St. Rep. 431, 59 N. E. 599; *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836, 83 N. W. 291.

STATE v. ELLSWORTH.

[131 N. C. 773, 42 S. E. 699.]

PLEA of Former Conviction is a collateral civil inquiry, and the burden of proof is upon the person offering it. (p. 791.)

PLEA of Former Conviction.—Verdict in favor of the accused on plea of former conviction contrary to the weight of the evidence, must be set aside and a new trial ordered. (p. 792.)

PLEA of Former Conviction—Former Jeopardy.—Trial of a plea of former conviction prior to the trial on the merits is a mere interlocutory proceeding, and not the subject of a subsequent plea of former jeopardy. (pp. 793, 794.)

PLEA of Former Conviction—Order Setting Aside Verdict—Appeal.—No appeal lies from an order setting aside the verdict on a trial of a plea of former conviction prior to the trial on the merits. (p. 794.)

R. D. Gilmer, attorney general, for the state.

H. H. McLendon, for the defendants.

⁷⁷³ CLARK, J. The defendants were indicted for breaking into a storehouse with intent to commit larceny, without specifying any articles, and their sentence on conviction was affirmed on appeal: *State v. Ellsworth*, 130 N. C. 690, 4 S. E. 548. During the pendency of that appeal, and before the decision ⁷⁷⁴ of this court therein had been rendered, an indictment was tried against the defendants for larceny of certain articles alleged to have been stolen by them from said storehouse immediately after their felonious breaking into the same. To this the defendants interposed the preliminary plea of former conviction, declining to plead to the merits till this plea had been disposed of.

The plea of former conviction is not a plea upon the merits. It is not an inquiry as to anything that the defendant has or has not done, and is not, therefore, of a criminal nature. It is a collateral civil inquiry as to what action the court has taken on a former occasion. The burden from the start is on the party offering it, and if it is not proven by him by a preponderance of evidence, the issue must be answered "No." So distinct is this collateral issue from the criminal inquiry that it is held that they should be tried separately: *State v. Winchester*, 113 N. C. 641, 18 S. E. 657; *State v. Respass*, 85 N. C. 534. It is held an "interlocutory plea," and that no appeal lies for defendant therefrom, but he can note his exception: *State v. Pollard*, 83 N. C. 597. When the plea of former conviction (or former acquittal) is not sustained, then the criminal trial begins unaffected by the interlocutory inquiry which has been taken as to the former action of the court: *Commonwealth v. Goddard*, 13 Mass. 455. So far from involving the criminal trial, the plea of former conviction is a confession and, therefore, it should be tried separately. There is a single issue on a trial for a criminal offense to which the response must be "guilty" or "not guilty." The issue here submitted was: "Have the defendants been formerly convicted of the crime wherewith they now stand charged?" There was no conflict in the evidence and the answer depended upon an inspection of the two indictments by the court. Being of opinion that

they were, as a matter of law, for different offenses, the judge ⁷⁷⁵ instructed the jury that if they believed the evidence, to answer the issue "No." He might have directed a verdict, for there was no evidence in favor of the party upon whom lay the burden of proof (*Spruill v. Northwestern etc. Ins. Co.*, 120 N. C. 141, 27 S. E. 39), if the judge was right in his legal conclusion upon inspection of the indictments. The jury, however, found the proposition of law, the only matter before them, differently from the judge and responded "Yes." Whereupon, he set the verdict aside, because "contrary to the weight of the evidence and against the instructions of the court."

The court cannot set aside a verdict of not guilty, though it may treat such verdict as a nullity when it has been procured by fraud (*State v. Tilghman*, 33 N. C. 513; *State v. Swepson*, 79 N. C. 632), and put the defendant on trial again. But this was not a verdict of not guilty. It was an interlocutory inquiry as to former action by the court, and the verdict by the jury being in the face of the instructions of his honor, and unsustained by any evidence, he could not do otherwise than set aside the verdict. The defendants have not been in jeopardy: 17 Am. & Eng. Ency. of Law, 592; *State v. Hager*, 61 Kan. 504, 59 Pac. 1080. Their guilt has not been inquired into by a jury on this bill. With this verdict set aside, there still remains a new trial upon this plea of former conviction, and if that is found against them, then the plea of not guilty will be tried unaffected by these preliminary inquiries, which are in the nature of a plea of abatement. So purely is this a collateral inquiry that when, as here, the plea turns upon an inspection of the two indictments, the court may decide the plea without the intervention of a jury, or may charge the jury that the plea is not sustained by the evidence: 9 Encyclopedia of Pleading and Practice, 640, and cases there cited, and *Martha v. State*, 26 Ala. 72, in which Chilton, C. J., says: "This is no invasion by the court of the province of the jury, for it is the duty of the court to declare ⁷⁷⁶ the legal effect of the record insisted on by the prisoner as sustaining her pleas"—of former acquittal.

In a somewhat similar inquiry, in *State v. Haywood*, 94 N. C. 848 (for forgery), the preliminary issue, "Is defendant sane and capable of conducting his defense?" was found by the jury "No." The trial court set aside this verdict, because against the weight of the evidence. This was tacitly recog-

nized on appeal as valid, for the defendant was immediately put upon trial for the forgery and convicted, and a new trial was granted on appeal for an objection to a grand juror, which, it was held, was not waived by the trial upon this preliminary plea, though it was held that it would have been if not made before the plea of not guilty was entered.

In *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202, 30 Atl. 1110, Hamersley, J., well says: "A theory seems at times to have prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens, and, therefore, a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed, like any other rule of practice, when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence, that cannot be altered, when the change may tend to secure his just punishment. It needs no argument to dispel such illusion, or to demonstrate that the natural rights of the individual, as well as the interests of public order, are best served and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law. . . . 'Putting in jeopardy' means a jeopardy which is real and has continued through every ⁷⁷⁷ stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undetermined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a nolle, nor by a nolle after the trial has commenced when the prisoner does not claim a verdict (2 Swift's Digest, 402; *State v. Garvey*, 42 Conn. 233); nor by the discharge of a jury in case of the sickness of a judge (*Nugent v. State*, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746), the sickness of juror (*Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 2 Camp. 207n; *Commonwealth v. Merrill*, Thach. C. C. 1), and innumerable other instances, which the learned judge cites with accompanying authorities, and it will be noted that all these apply to events after a trial upon the general issue has begun.

Our conclusion is, that "a plea of former acquittal or former conviction not being of matter involved in the general issue—not being matter which goes to the question of guilt—a judg-

ment (or verdict) sustaining it cannot be in the nature of an acquittal": *State v. Hager*, 61 Kan. 507, 59 Pac. 1080.

It was held in *State v. Pollard*, 83 N. C. 597, as above stated, that no appeal lay from a judgment overruling an interlocutory plea of former conviction, since the criminal trial upon the plea of not guilty must still take place, and if the defendant is acquitted on that, the appeal and incidental delay would be in vain, and, therefore, he should merely note his exception and have the interlocutory judgment reviewed if the final judgment is against him. For a stronger reason, no appeal lays here from setting aside the verdict on the interlocutory plea, when there remains still both the new trial upon the interlocutory plea, and, if that should go against the defendants, then the criminal trial upon the plea of not guilty, and if either of these go in favor of the defendants, ⁷⁷⁸ such appeal as this would be useless. The defendants should have simply noted an exception to setting aside the verdict.

The point whether the indictment covers the same offense as that on the former trial was also discussed before us, but need not be considered, as the verdict was set aside because against the weight of the evidence, which is a matter of discretion (it not being a criminal matter), and further, because the conviction of the defendants for the burglary having been affirmed by this court since the trial of the interlocutory plea in this case, and they being (as counsel state) now undergoing sentence therefor in the state's prison, we have no doubt a nolle prosequi will be entered in this cause below.

Mr. Justice Douglas Dissented from the proposition maintained in the majority opinion that the trial of a plea of former conviction is "a collateral civil inquiry." He maintained that such plea was a plea in bar, and as much a defense as a plea of not guilty, and, if found in favor of the defendant, was a complete bar to any further prosecution of the charge and as full an acquittal thereof as if there had been a verdict of not guilty. Hence the action of the trial court in setting aside the verdict in favor of the defendant on his plea of a former conviction, as being contrary to the weight of the evidence, was erroneous.

The Plea of Former Conviction is discussed in the monographic note to *People v. McDaniels*, ante, pp. 89-159. Putting in jeopardy means a jeopardy which is real and has continued through every stage of one prosecution: See *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202, 30 Atl. 1110; *State v. Bates*, 22 Utah, 65, 83 Am. St. Rep. 768, 61 Pac. 905.

STATE v. RAY.

[131 N. C. 814, 42 S. E. 960.]

MUNICIPAL ORDINANCES—Early Closing.—A city ordinance requiring stores to be closed after a certain hour in the early evening is invalid, as an unauthorized interference with the free use and enjoyment of property. (p. 797.)

Appeal dismissed.

R. D. Gilmer, attorney general, and E. L. Travis, for the state.

W. A. Dunn, for the defendant.

§15 FURCHES, C. J. The defendant is the owner of a dry-goods and grocery store (not of liquors) in the town of Scotland Neck, Halifax county.

Scotland Neck is an incorporated town, and on the "Fourth of July," 1902, the commissioners of said town passed this ordinance: "It shall be unlawful for barrooms, groceries, dry-goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to keep open later than 7:30 o'clock P. M., except Saturdays. Any one violating this ordinance shall be fined five dollars for each and every violation."

The defendant admits that he is the owner of a drygoods and grocery store in the town of Scotland Neck, and that he has kept it open later than 7:30 P. M. since the seventh day of July, 1902, the date at which said ordinance was to go into effect, but pleads not guilty, and a special verdict was returned finding the facts as above.

It is admitted that the charter of said town gives no special authority for the passage of such an ordinance, and that the commissioners had no authority for the passage of said ordinance, except the general powers incident to municipal corporations.

This presents squarely the question of corporate power to pass and enforce such an ordinance without any legislative authority to do so, except the fact that it is a chartered municipality. It is therefore not necessary that we should discuss the power of the legislature to pass such an act, or to authorize a municipality to pass such an ordinance, and we do not enter into the consideration of that matter.

It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested, ⁸¹⁶ that defendant's keeping his store open after 7:30 interfered with the rights of anyone else. It was said that the other merchants in Scotland Neck were willing to close their stores at 7:30, but the defendant was not; and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant's store?

It would seem that no legislative power exists under our form of government and our ideas of personal liberty, as to allow such to interfere with the rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the public. When such interference is authorized, it is under the doctrine of eminent domain, or what is known as the police power of the government. The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police power of the government. If the state could exercise such power (and we do not say it could), can a municipal corporation do so without express authority from the state? The general rule is that a municipal corporation can only exercise such powers as are expressly given in its charter, or such as are necessarily implied by those expressly given. This doctrine is well expressed by Mr. Dillon in volume 1, section 89, which is copied by Justice Avery in *State v. Weber*, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598, and is approved and adopted by this court in that case: "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied; 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." ⁸¹⁷ Any fair, reasonable doubt concerning the exercise is resolved by the courts against the corporation, and the power is denied." The same doctrine is probably more pointedly stated as applicable to the case now under consideration, in *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, as follows: "An ordinance," says Dillon (1 Dillon on Municipal

Corporations, sec. 325), "cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such rights, authority to regulate conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit. If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in section 3799 of the Code, to give them equal authority with the legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given by the statute, and its attempted exercise was therefore unlawful."

It seems to us that these authorities settle the question, and plainly show that this ordinance was unlawful and cannot be enforced.

It is said that towns are constantly exercising such power over barrooms where liquors are sold. This power, so far as our investigation goes, is expressly given in the charters. But if there is any case where it is not, it must be understood that they stand on a very different footing to the sale of drygoods and family groceries. Liquor itself is regarded as an evil, an enemy of civilization and of good government: *Bailey v. Raleigh*, 130 N. C. 209, 41 S. E. 281; *State v. Barringer*, 110 N. C. 818 525, 14 S. E. 781. Its sale without a license is condemned and prohibited by law, and the regulations closing such shops might well be put upon the implied power, as being for the public good. But however that may be, that is not the question before the court, and what has been said as to the sale of liquors has only been said to meet an argument of the state.

It is also said that the state of California has exercised such power without express legislation, and that the supreme court of the United States affirmed the judgment of the California court. But when those cases are examined, it will be found that they were cases where the business of ironing was carried on all night in a thickly settled portion of the city of San Francisco, consisting of old wooden buildings near the sound, where the wind usually blew hard, which made it very dangerous to carry on such work, at late hours of the night, on account of

fire. And the opinions rest upon the ground that it was for the public good—the protection of the public from the danger of fire, that the city was allowed to prevent such persons from carrying on such work at such late hours of the night. But the supreme court of the United States only affirmed the ruling of the state court, which is the rule of that court where there is no federal question involved. So it amounts to no more than a decision of the supreme court of California against the repeated decisions of our own supreme court. And were we to admit that the distinction does not exist between the California case and this case, which we have pointed out, the question then is, Shall we adhere to our own decisions when we are not able to see any error in them, or shall we adopt the opinion of the court of California? We prefer to follow our own decisions, and are of the opinion that the corporate authorities of Scotland Neck were not authorized to pass the ordinance under consideration, and it is void.

There is error, and under the special verdict, the defendant ⁸¹⁹ was entitled to an acquittal and discharge. The judgment of the court below is reversed.

Mr. Justice Clark Dissented and maintained that the reasonableness of the ordinance being conceded, the only possible contention to be discussed is the question of power to pass the ordinance. This he claimed was ample, and said that “the charter of the town (Priv. Laws 1901, c. 342, sec. 15) broadly gives its commissioners the usual powers conferred on towns and cities by the Code, chapter 62. Among the powers conferred expressly by that chapter are, independent of the inherent and accidental powers of every municipal corporation, those of the Code, section 3799: ‘They shall have power to make such by-laws, rules and regulations for the better government of the town as they may deem necessary; provided the same be not inconsistent with this chapter or the laws of the land’; and section 3802: ‘They may pass laws for . . . preserving the health of the citizens.’” As sustaining his contention that these statutory provisions conferred power upon the town to pass the ordinance in question, he adopted the language of *Hill v. Board etc. of Charlotte*, 72 N. C. 56, 21 Am. Rep. 451, as follows: “We conceive that nothing can be clearer than that when a general authority is given to a municipal corporation to be exercised through its proper legislative officers, to make ordinances for the good government, health and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities to determine what ordinances are proper for those purposes.” In confirmation of his views he also cited *In re Hang Kie*, 69 Cal. 152, 10 Pac. 327; *St. Louis v. Cafferata*, 24 Mo.

94; State v. Freeman, 38 N. H. 426; State v. Austin, 114 N. C. 856, 41 Am. St. Rep. 817, 19 S. E. 919; State v. Thomas, 118 N. C. 1221, 24 S. E. 535; Hudson v. Geary, 4 R. I. 485; Barbier v. Connelly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730.

A Municipal Ordinance prescribing the hours when markets may be kept open is a valid exercise of the police power: Jacksonville v. Ledwith, 26 Fla. 163, 23 Am. St. Rep. 558, 7 South. 885; State v. Namias, 49 La. Ann. 618, 62 Am. St. Rep. 657, 21 South. 852. A curfew ordinance is held unreasonable and void in *Ex parte McCarver*, 39 Tex. Cr. Rep. 448, 73 Am. St. Rep. 946, 46 S. W. 936.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

EX PARTE HILTON.
[64 S. C. 201, 41 S. E. 978.]

ESTATES OF DECEDENTS — **Commissions of Administrator.** If one of several administrators performs no services, he is not entitled to any commission. (p. 802.)

JUDGE — **Waiver of Disqualification of.** — An objection to a judge on the ground that he is related to one of the parties may be waived, and is waived if known to a litigant and not made by him until after the cause has been heard and judgment orally pronounced. (p. 804.)

Graydon & Giles, for the appellants.

Sheppard & Grier, contra.

202 GARY, J. This was a proceeding for the final settlement of the estate of Sarah C. Hilton, deceased. The appeal raises two questions: 1. Was the appellant entitled to commissions? 2. Did the appellant waive the right to interpose the objection that the probate judge was related to the parties within the prohibited degree? The facts are thus set forth in the decree of the probate judge:

"There was due to the estate one note for \$800 by each of the legatees, bearing different rates of interest and for different times. It was agreed by the parties in interest and their attorneys that the interest on these notes should be paid in to settle the debts of the estate. Upon computing the notes the following amounts were found due and payable, to wit:

On Mrs. Emma H. Moore's notes.....	\$279 77
On Mrs. Lula H. Harvey's notes.....	168 66
On Mrs. Minnie Griffin's notes.....	134 22
On J. C. Hilton's notes.....	130 00
	<hr/>
	\$712 65
To which add sale bill.....	43 75
	<hr/>
	\$756 40
Less debts of estate.....	150 75
	<hr/>
	\$605 65
203 Leaving to be distributed among the four distri-	
butees as follows, to each.....	151 41
This would require of Mrs. Moore to pay in.....	\$128 36
This would require of Mrs. Harvey to pay in.....	17 25
J. C. Hilton, interest \$130 and sale bill \$43.75—	
less his share, \$151.41.....	22 34
	<hr/>
	\$167 95
To Mrs. Griffin.....	17 19
	<hr/>
	\$150 76

"The matter of commissions to the administrators being raised by Mr. Graydon, the court ruled that no commissions were due to either, since no collection of the notes had been made. Under the statute, section 2069, administrators are not entitled to commissions on any estate bequeathed to them, the court considering the said notes equivalent to a bequest for these reasons, viz: The notes being for equal amounts, and it being admitted by all of the distributees that Mrs. S. C. Hilton had thereby undertaken to distribute her estate during her lifetime, and required only that the interest should be paid annually to furnish a support for her. And because Mr. Hilton had done all the work which had been done and for which he does not and will not charge commissions.

"It is, therefore, ordered and decreed, that Mrs. Moore pay into this court:

Said amount of interest.....	\$128 36
And amount due on sale bill.....	3 50
	<hr/>
	\$131 86
That Mrs. Lula H. Harvey pay in amount interest ..	17 19
And amount due on sale bill.....	13 50
That J. G. Hilton pay in.....	22 34
	<hr/>
	\$184 89

To be paid on or before the tenth day of June, 1901.

"Before the said decree was filed but after the hearing in the probate court, the attorneys of Mrs. Moore learned that ²⁰⁴ the probate judge was related to all the parties within the sixth degree by blood and to Mrs. Griffin within the sixth degree by marriage. They thereupon called the attention of the probate judge to such relationship, and objected to his proceeding further with the case on the ground that the constitution forbids him to render a decree in such a case. Notwithstanding such objection the probate judge thereafter wrote and filed the above decree."

On hearing the appeal from the decree of the probate judge, his honor, the circuit judge, thus disposes of the appellant's right to commissions: "I am in full accord with the position taken by the judge of probate in this matter in disallowing the commissions claimed by Mrs. Moore, and sustain him therein. It was never intended to burden estates with fictitious charges, and commissions allowed administrators are for services rendered the intestate estate, and where there is no service there can be no commission, and I overrule this ground of appeal. If there was any service, it was rendered by Hilton." Section 2071 of the Revised Statutes is as follows: "The commissions given by this chapter shall be divided amongst executors and administrators in proportion to the services by them respectively performed, to be rated and settled by the judge of probate who granted probate of the will or letters of administration, if the executors or administrators cannot agree amongst themselves concerning the same." Both the probate judge and his honor, the circuit judge, find as a fact, in which this court concurs, that if there was any service it was rendered by the administrator, J. G. Hilton. This unquestionably shows that the appellant was not entitled to any portion of the commissions.

We will next consider whether the appellant waived the right to interpose the objection that the probate judge was related to the parties within the prohibited degrees. Section 6, article 5, of the constitution contains the provision that no judge shall preside at the trial of any cause in the event of which he may be interested, or when either ²⁰⁵ of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law. Section 2296 of the Revised Statutes, which remained of force after

the constitution of 1895, is as follows: "No judge or other judicial officer shall preside on the trial of any cause where he may be connected with either of the parties by consanguinity or affinity within the sixth degree." The distinction between jurisdiction of the person and of the subject matter is clearly pointed out by Mr. Chief Justice Melver, in *Martin v. Fowler*, 51 S. C. 164, 28 S. E. 312, as follows: "In the former, jurisdiction cannot be waived by any act or admission of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of a subject over which the law has not conferred jurisdiction upon such tribunal. As is well said in *Elliott on Appellate Procedure*, section 498: 'The theory of the law is that where there is an absolute want of jurisdiction, there is no court, and it is too clear for controversy that a party can neither create a court nor endow it with authority over a subject not placed within its jurisdiction by law.' Hence the well-settled doctrine that consent cannot confer jurisdiction of the subject. But in the latter the rule is very different. The party may by consent confer jurisdiction of the person, or may waive the right to raise the question whether the court in a given case has obtained jurisdiction of his person in the mode prescribed by law, as is illustrated by the familiar instance of a party, who though not served with the summons appears and answers, and is thereby precluded from afterward raising the question as to whether the court had acquired jurisdiction of his person. Here there is obviously no question as to the jurisdiction of the subject, as there can be no doubt that the court of common pleas had jurisdiction of the action to foreclose a mortgage. The only question of jurisdiction is as to the parties, and if, as we have seen, the defendant has by his acts and admissions estopped himself from raising that question, there is an end of the matter." The question ²⁰⁶ under consideration relates to jurisdiction of the person, and may be waived. In the note on page 995 of 24 *Encyclopedia of Law*, first edition, the following language is used: "After a trial has been commenced, no attempt to recuse a judge will be listened to, unless it be shown affirmatively that the party was not aware of the objection, and was in no fault for not knowing it." Again: "If the facts are known to the party recusing, he is bound to make his objection before issue joined and before the trial is commenced, otherwise he will be

deemed to have waived the objection in cases where the statute does not make the proceedings void." The case of *State v. Faile*, 43 S. C. 52, 20 S. E. 798, shows that a party may waive the right to invoke the protection afforded by a provision of the constitution. In the case under consideration, the appellant did not raise the objection that the probate judge was related to the parties within the prohibited degrees until the case was heard and the probate judge had announced his judgment orally. After this it was only necessary for the probate judge to formulate his decision in writing. At the time the appellant made the objection she knew the conclusion which the probate judge had reached. Under the circumstances, the appellant waived the objection of which she was aware when the proceedings were commenced.

It is the judgment of this court that the judgment of the circuit court be affirmed.

That a Judge is Disqualified by relationship to any person interested in the judgment or decree, see *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 South. 432; *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616. As to who are related by affinity, see the monographic note to *State v. Wall*, 79 Am. St. Rep. 200-205. Where statutes expressly declare that a disqualified judge shall not act in a cause, his judgment cannot be made good by consent or waiver; but in the absence of such statutes, the parties may give him jurisdiction by consent or waiver: See the monographic note to *Moses v. Julian*, 84 Am. Dec. 130.

STATE v. HOWARD.

[64 S. C. 344, 42 S. E. 173.]

APPELLATE PRACTICE.—An Objection to the Jury not Made in the Trial Court will not be considered on appeal. (p. 806.)

BURGLARY—Who may Commit.—A Servant Permitted to Sleep in and Occupy the Same Room with His Master, in the latter's dwelling, may be guilty of burglary therein, as where, after leaving the house at night, he returns and enters, either by opening a door or raising a window sash, with intent to steal money therein, whether or not he had taken such money out of a trunk in which it was kept before leaving the house. (p. 807.)

BURGLARY by a Servant.—If a servant enters his master's dwelling rightfully in pursuance of his trust and employment, and, after so entering conceives a felonious purpose and attempts to carry it out, his offense is not burglary, but if, being out of the dwelling, he

does that which would constitute a breaking and entering if done by a stranger and with intent to steal, or, after being within without breaking, he breaks an inner door with such purpose, he is guilty of burglary. (p. 808.)

W. S. Tillinghast, for the appellant.

Solicitor Davis, contra.

³⁴⁵ JONES, J. The defendant was convicted under an indictment for burglary and larceny, and being recommended to mercy by the jury, was sentenced to five years imprisonment in the penitentiary. He was not represented by counsel on the trial, but after conviction he secured counsel and moved for a new trial, "on the ground that a joint occupant of a dwelling-house cannot be convicted for burglariously breaking into such dwelling-house," which motion was refused by the circuit court, "the court being of the opinion that the testimony establishes the fact that the defendant was a servant and not a joint occupant of the dwelling-house in question." The defendant appeals, excepting that the court erred: 1. In holding that a man can be indicted for burglary in his own house; 2. In holding that a joint occupant of a dwelling-house could be convicted of burglary in breaking and entering such dwelling-house; 3. There is an entire failure of evidence of any breaking in this case; 4. That the defendant was without counsel on his trial, and it was incumbent upon the state to try him by a legally constituted jury, and there being no law authorizing the array of jurors that tried defendant, the conviction was illegal, and the court was without jurisdiction to impose the sentence on him.

These exceptions take a much wider range than is justified by the "case" presented as a basis for exceptions. In reference to the exception touching or alleging illegality of the jury, it does not appear that any objection to any juror or to the venire was raised in the circuit court or was considered by said court, nor is there any fact stated in the "case" upon which any such exception ³⁴⁶ could be predicated. A new trial will not be granted for alleged illegality of the jury, which is asserted for the first time in this court.

The circuit court did not hold that a man can be indicted for burglary in his own house, as alleged in the first exception, nor did the court hold that a joint occupant of a dwelling-house could be convicted of burglary of such house, as alleged in the second exception. The motion for a new

trial was made upon the single ground stated above, viz., that a joint occupant of a dwelling-house cannot commit burglary of such house, and the new trial was refused because the court considered the evidence as showing that defendant was merely a servant and not a joint occupant. The motion assumed the existence of evidence tending to show a burglary except that, in view of defendant's counsel, the evidence showed that defendant jointly occupied the house with the prosecutor, and that such joint occupant could not commit burglary in such house. The evidence as to the relation between the prosecutor and the defendant with reference to the house was rather meager. The prosecutor, however, testified that the defendant had been staying with him about a month, and that on the 2d of October, 1901, the night of the alleged burglary, between 1 and 2 o'clock, the defendant went out of the house, and on prosecutor's asking where he was going defendant answered, "Just a little ways." The defendant testified that he had been working for the prosecutor for three months, for which prosecutor owed him. This testimony supports the view of the circuit judge, that the defendant was a servant of the prosecutor and not a joint occupant of prosecutor's dwelling; but perhaps the testimony might justify an inference that defendant was permitted to lodge in the dwelling-house of his employer, and there was no evidence that defendant occupied any room other than that occupied by the owner. We will, therefore, in liberality to the appellant, consider the case as one of a servant permitted to sleep in or occupy the same room with the master and owner of the dwelling. ³⁴⁷ charged with burglary of such dwelling. Was it error of law to refuse the motion for a new trial? If there was any testimony to support the verdict, it was not error to refuse new trial. This court will not consider the sufficiency of evidence to convict, but will examine the testimony only for the purpose of ascertaining if there was any testimony tending to prove the charge, it being error of law to refuse a new trial only when there is a total failure of evidence tending to prove the charge or allegation. There was evidence tending to show that the prosecutor was the owner of the dwelling-house, as alleged in the indictment; that on the night of the 2d of October, 1901, between 1 and 2 o'clock, the defendant, who had for some time previous been in the employ of the prosecutor, Paul Cooxan, and had probably been permitted to occupy the same room occupied by the owner as a lodging place, went out of said dwelling, closing the door behind him; that the

house was closed up when defendant went away; that early that morning the prosecutor discovered that his trunk had been broken into and about sixteen dollars in money taken therefrom, and that the sash of the window was open or broken; that the defendant was missing; that the prosecutor pursued and found the defendant in Beaufort, in the possession of about thirteen dollars of the stolen money, having spent some for a cart; and that defendant confessed to having taken the money. The testimony was such as required it to be submitted to the jury to determine whether the defendant, after leaving the house that night, returned and entered either the door by pushing it open, or the window by raising the sash, with intent to steal the money, or whether he had taken the money out of the trunk before he left the house that night, between 1 and 2 o'clock; and in the absence of any complaint as to the charge, we are bound to assume that the jury were properly instructed. If the defendant, being rightfully in the prosecutor's dwelling as his servant, broke open the trunk and stole therefrom the money, that would not constitute burglary; but if being without the dwelling he ³⁴⁸ should push open a closed door or raise a sash and enter, not for the purpose of using the dwelling-house as a lodging place within his trust and employment, but for the purpose of stealing his master's goods, which, of course, is not within his trust and employment, that would be burglary. A servant's right to enter his master's dwelling depends upon the purpose with which he enters. If he enters pursuant to the trust of his employment, being rightfully in, if he then conceives the felonious purpose and attempts to carry it out without breaking any inner door, it is not burglary, for there is no breaking and entering with felonious intent; but if, being out of the dwelling, he does that which would constitute a breaking and entering, in a stranger, and does it with the intent to steal or commit a felony; or if, being in without breaking, he breaks an inner door with such purpose, then he commits burglary, for the entrance for such purpose is in violation of his trust and employment. It is true that one cannot commit burglary of his own dwelling-house, since burglary is the breaking and entering in the night of the dwelling-house of another, with intent to commit a felony therein. But a servant who is permitted to lodge in the same room with the master and owner of the dwelling, has no such interest in the dwelling-house as to make it in any proper sense his dwelling; and upon the facts in this case it was properly laid in the indictment as the dwelling of the

prosecutor. "When persons are abiding in a house as guests, or by sufferance or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offense as in the mansion of the proprietor of the house": Archibald's Criminal Practice and Pleading, 1094-1099. In 2 Russell on Crimes, 7, citing 1 Hale's Pleas of the Crown, 553, it is stated: "It will amount to burglary if a servant in the night-time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape or with any other felonious design, etc." In 2 Bishop's Criminal Law, section 97, the author states: "If one ³⁴⁹ is within, however lawfully, and there breaks an inner door through which he enters a room with burglarious intent, as where a servant lifts the latch and goes into a chamber to commit murder or a rape, it is burglary." In a note to this section the author says: "Probably if the chamber were his own lodging-room, the case would be otherwise, because of his quasi interest." Lord Hale makes the distinction, whether the "opening of the door is within his trust"; if it is, he considers "the breaking with felonious intent not to be burglary, but otherwise if it is not within his trust." But we do not think that a servant, though permitted to lodge with the master in the master's chamber, has any such interest in the dwelling or habitation as would make it within his trust and employment to enter such chamber with felonious intent to steal the master's goods. The principle is well stated in *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9, thus: "Though he [the servant] might have the privilege of opening and entering his master's mansion-house to go to bed therein, he would, it seems to me, be guilty of burglary, if he unlocked and entered it in the night-time, with the intent to rob, and did then commit robbery therein; only to justify a conviction in such a case, the jury ought to be satisfied by the evidence beyond a reasonable doubt that the intent to rob existed when the house was entered, not formed afterward." Assuming, therefore, that the defendant was the servant of the prosecutor and had permission to lodge in the same room with the prosecutor, there being some evidence that he entered through the closed door or by raising the window sash with intent to steal the prosecutor's money, and did so steal the money, it was not error of law to refuse the motion for a new trial.

Judgment affirmed.

Burglary.—A servant and office boy of an attorney, intrusted with the key to the front door of the office, and entering, by night, by using the key, with intent to steal, the attorney sleeping in an inner room, is guilty of burglary; but not so if the boy is in the habit of sleeping in the office, to the knowledge of his employer, and enters to go to bed, and after entering forms the design to steal: *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9; monographic note to *People v. Richards*, 2 Am. St. Rep. 386.

STEINMEYER v. STEINMEYER.

[64 S. C. 413, 42 S. E. 184.]

INSURANCE—Construction of Policy.—A Clause Relating to a Change in the Condition of the Title of the property insured relates to a change taking place after the issuing of the policy. (p. 811.)

CONVEYANCE, Voluntary—Effect of.—The title of a grantee in a voluntary conveyance is good against the grantor and the whole world, subject to the equity of his creditors to have the property, if necessary, applied to the payment of their judgment against him. (p. 812.)

INSURANCE of Grantee Holding a Voluntary Conveyance.—The condition in a policy of insurance, that if the insured has not the conditional and sole ownership it shall be void, is not broken by the fact that he holds under a voluntary conveyance from his grantor which the latter's creditors have been adjudged to have the right to avoid to the extent of selling the property so far as may be necessary to discharge their obligations. (p. 812.)

INSURANCE, Proceeds of—Creditors, when not Entitled to.—If the grantee of property under a voluntary conveyance procures insurance thereon, the creditors of the grantor, though adjudged entitled to sell it for the satisfaction of their judgments, are not, on its destruction by fire, entitled to the proceeds of the insurance so effected. Such proceeds must be deemed the property of the person insured. (p. 815.)

Action by Ella G. and George E. Steinmeyer against Carrie Steinmeyer and the Germania Fire Insurance Company. The plaintiff and the insurance company appealed from the decree in the circuit court.

Buist & Buist and J. E. Burke, for the plaintiffs.

Mitchell & Smith, for the insurance company.

414 JONES, J. This contest involves the question whether the Germania Fire Insurance Company is liable on its policy of fire insurance issued to Carrie Steinmeyer, and, in the event of such liability, who is entitled to the proceeds of the policy. The defendant company issued its policy to Carrie Steinmeyer

on the eighth day of May, 1899, insuring certain buildings therein mentioned, known as No. 118 Beaufain street, in the city of Charleston, South Carolina, against loss or damage by fire. These buildings were partially destroyed by fire on the twenty-fourth day of May, 1899, and the damage was adjusted at five hundred and eighty dollars. The insurance company denies liability, alleging that the policy is void by reason of the breach of the ⁴¹⁵ conditions of said policy, the answer in this regard being as follows:

"5. Further answering and for further defense, this defendant alleges that the said policy of insurance contained a provision or condition that the same should be void if the interest of the insured in the property be not truly stated herein; and this defendant is informed and believes, and on information and belief avers, that the interest of the said Carrie A. E. Steinmeyer was not truly stated in said policy, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated to hold said property as trustee, and that by reason of said violation of said provision or condition of said policy the said policy has become null and void, and this defendant is not liable thereunder.

"6. That said policy of insurance contained a further provision or condition, that the same should be void if the interest of the insured be other than unconditional and sole ownership, or if any change took place in the interest, title, or possession of the subject of insurance, except change of occupants, without increase of hazard, whether by legal process or judgment, or by voluntary act of the insured or otherwise. And this defendant is informed and believes, and on information and belief avers, that the interest of the insured, the said Carrie A. E. Steinmeyer, was not unconditional and sole ownership, and that her interest and title in the subject of insurance has been changed, inasmuch as the said Carrie A. E. Steinmeyer has been adjudicated not to have been unconditional and sole ownership in said property, and that she held the same in trust. And that by reason of said violation of said provisions and conditions of the said policy the said policy has become null and void, and the defendant is not liable."

The policy contained provisions that the entire policy "shall be void, . . . if the interest of the insured in the property be not truly stated herein . . . if the interest of the insured be other than unconditional and sole ownership, . . . or if any change, other than by death of the insured, take ⁴¹⁶ place in the interest, title or possession of the subject of insurance (ex-

cept change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise." The property insured was originally owned by Eliza R. Steinmeyer, who conveyed the same to Carrie Steinmeyer in May, 1894, who every year thereafter up to the date of the policy in question, insured the premises in the defendant company in her own name and interest. In 1897 creditors of Eliza Steinmeyer brought an action to set aside this deed, with other conveyances, as in fraud of their rights, and as the result of that suit this court affirmed the decree of the circuit court, rendered August 13, 1894, adjudging said conveyance to be voluntary, and subjecting the property conveyed, if necessary after exhausting the grantor to the payment of the judgment in favor of the grantor's creditors. The decree of this court in said cause (*Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15), was rendered April 18, 1899, and the remittitur was filed in the circuit court May 2, 1899. Six days thereafter the policy in question was issued. After the fire, which occurred on the twenty-fourth day of May, 1899, the property was sold under the order of the court, and the proceeds applied to the judgment in favor of the said creditors, leaving a balance due thereon more than the amount of the insurance money claimed.

Do these facts warrant a conclusion that the policy is void by reason of a breach of the quoted conditions? We think not. The clause or condition last quoted, relating to change of interest, title or possession, is not applicable, for such condition refers to change of interest after the issuance of the policy and before the fire. In this case it appears that there was no change of interest between the issuance of the policy and the fire. The other conditions relate to the interest or ownership of the insured at the time of the insurance. Such conditions are reasonable and valid, and a breach of them should prevent a recovery. In section 283 of 1 May on Insurance, the author says: "Inquiries about a greater or less interest ⁴¹⁷ and a more or less perfect title usually refer to the quality of the estate, having reference to its duration, whether an estate in fee, for life, for years or at will, to what is vested in distinction from what is conditional or contingent, and not to questions of encumbrances, as affecting the quantity of the estate." The question then is, What was the interest of the insured, and was her ownership sole and unconditional with respect to the insurance company at the time of the insurance? The title of a grantee in a voluntary conveyance by the owner is good against the grantor and all

the world, subject to the equity of the grantor's creditors to have the property, if necessary, applied to the payment of their judgment against the grantor. In the absence of actual fraud, as in this case, a voluntary deed is not void *ab initio*, and it is unassailable even by the creditors of the grantor until it is legally ascertained that the property is necessary to pay the creditor, after exhausting the grantor: *Suber v. Chandler*, 18 S. C. 529. Then it is void only as against the right of the creditor to subject it to his judgment. When it is said that such a voluntary deed is "void" or "set aside," these terms must be understood as meaning only that the conveyance, while good against all others, shall not operate to defeat the equity of the creditors of the grantor. With respect to any right of the insurance company, the insured, by the grant of the owner, was invested with the fee simple title at the time of the insurance. The insured's ownership was sole, because no one else had any interest in the property as owner, and it was unconditional because the quality of her estate therein was not limited or affected by any condition. The right of the grantor's creditors in certain contingencies to subject said property to their claims did not give such creditors any interest in the property as owners, nor did the judgment declaring the deed void as against creditors operate to restore the fee to the grantor, with respect to the insurance company. The status of the voluntary grantee at the time of the insurance was rather that of one holding the fee subject to an encumbrance, the ⁴¹⁸ equity of the grantor's creditors. The existence of a lien or encumbrance on the insured's property is not a breach of the condition which requires sole and unconditional ownership: *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *Dolliver v. St. Joseph etc. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378. It does not appear that any inquiries were made by the insurance company as to the existence of encumbrances against the property, and no representations were made by the insured touching her interest in said property except what would be involved by the use of the terms of the conditions considered. The insured was in the use and possession of the premises under said deed at the time of the insurance, and clearly had an insurable interest therein; and it is difficult to say how she could have described her interest or estate in the property other than as sole and unconditional

owner. All would admit that she would have been such an owner if the claims of the grantor's creditors had been paid by any one, or in any way released or discharged before sale of the premises. But as the creditors had no title in the premises to convey, how could the mere payment of their claims add anything to the insured's title, beyond merely removing an encumbrance. Under the circumstances, the position of the insured was not essentially different than would be the position of any debtor insuring property held in fee simple, but subject to an outstanding mortgage or judgment lien. Such outstanding encumbrances may undoubtedly affect the risk, but the insurance company may, if it sees fit to do so, protect itself against such risks by appropriate stipulations in the contract.

The next question is, Who is entitled to the proceeds of the policy, the insured, Carrie Steinmeyer, or the plaintiffs, who claim as creditors of the grantor, Eliza Steinmeyer? The contention of the plaintiffs is that in respect to the proceeds ⁴¹⁹ of the policy, Carrie Steinmeyer, while not being an express trustee, has a relationship to plaintiffs in the nature of a quasi trustee, and public policy will, therefore, require that the proceeds of the policy should be applied, *ex aequo et bono*, to the plaintiffs. To sustain this proposition plaintiffs cite the cases of *Bath Paper Co. v. Langley*, 23 S. C. 129; *Clyburn v. Reynolds*, 31 S. C. 118, 9 S. E. 973; *Green v. Green*, 50 S. C. 532, 62 Am. St. Rep. 846, 27 S. E. 920. The two last-named cases held that insurance money collected by a life tenant on a total loss by fire should be used in rebuilding or should go to the remainderman, reserving the interest of the life tenant for life to him, upon the ground that a life tenant, with respect to the property insured, was a quasi trustee to the remainderman, and that public policy requires such a disposition of the proceeds of insurance so effected. These cases are not applicable, as the insured in this case was not a life tenant insuring for full value buildings, the fee in which belonged to remaindermen, with whom the insured occupied a relation of trust with respect to the preservation of the property insured. The case of *Bath Paper Co. v. Langley*, 23 S. C. 129, comes more closely to the point in hand; but in that case the insured had purchased property at a sheriff's sale under circumstances amounting to fraud in law, and while in possession under the sheriff's deed had insured the property, and it having been burned, received the insurance money. The court having held the sale void by reason of the conduct of the purchasers in entering into an agreement having the effect to

chill the bidding, held the insured accountable to the true owner for the insurance money. The language used by the court was: "If, as we have seen, the defendants stood in the relation of quasi trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged ex aequo et bono, to the plaintiffs. This money may be regarded as a compensation, in part at least, for the loss of property which has been adjudged to be the property of the plaintiffs, and, therefore, in equity and good conscience, it belongs to the ⁴²⁰ plaintiffs. Any other view would, contrary to well-established principle, enable the defendants to make profit for themselves out of the quasi trust property. It is, in effect, money had and received by the defendants to the use of the plaintiffs, and as such recoverable by the plaintiffs, subject, however, to a deduction of all amounts actually paid by the defendants, either by way of premiums or otherwise, in effecting or collecting such insurance." In the case just cited, the insured effected insurance on the property of another, of which he had obtained possession under circumstances which rendered the sale voidable by the owner. In this case, the insurance was effected by one to whom the original owner had conveyed by deed, which the original owner and grantor could not assail. This case should be decided upon correct principles of law as applicable to the respective rights of the parties under the particular facts. All must admit, and we have already held, that the insured had an insurable interest in the buildings which were partially burned, and that such insurable interest is covered by the policy. No one has estimated the value of such insurable interest except as valued in the adjustment of the amount of the loss, five hundred and eighty dollars. Can it be said that the insured shall take nothing as the fruit of her contract with the company, for which she alone paid the consideration? The proper solution of the question requires that notice be taken of the nature of the policy of insurance. The authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire. Being a personal contract, it does not run with the buildings said to be insured, is not an incident to the thing insured. Being a contract of indemnity, it is essential that the insured have an insurable interest in the subject of insurance: 1 May on Insurance, secs. 2. 6; 16 Ency. of Law, 2d ed., 820-843; *Carpenter v. Insurance Co.*, 16 Pet. 496; *Annelly v. De Saussure*, 26 S. C. 505, 4 Am. St. Rep.

725, 2 S. E. 490; *Swearingen v. Insurance Co.*, 52 S. C. 315, 29 S. E. 722. If, ⁴²¹ therefore, Carrie Steinmeyer had an insurable interest, and her loss with reference to that interest has been estimated to be the fund in dispute, and if the contract for which she alone paid the premium is one of personal indemnity, upon what principle of law, justice or public policy can that which is hers be given to the creditors of another? It is not doubted that the creditors of Eliza Steinmeyer had the right to resort to the insured property, or to that into which the insured property had been converted, having the right to follow the property of their debtor, but this gives them no right to the insurance money, which does not represent their debtor's property, but represents the amount of personal indemnity going to Carrie Steinmeyer for her loss. In 14 Encyclopedia of Law, second edition, 343, the law is thus stated: "Money due on a policy of insurance, procured by the grantee on buildings situated on the property, title to which has been conveyed to him in fraud of the grantor's creditors, is not to be deemed proceeds of the property, and cannot be subjected by the grantor's creditors to the payment of his debts. A policy of insurance against fire is not an incident to the property insured, but is a mere special agreement with the insured, indemnifying him against such loss or damage from fire as he may sustain thereby. If the creditors have a lien by mortgage, judgment or execution, they can insure their own interest, but they can have no right to attach insurance money due to any one but their own debtor." Among the cases cited to support the text is *Forrester v. Gill*, 11 Colo. App. 410, 53 Pac. 230, which is exactly in point, and thus reasons out the proposition: "A transfer of property made with the intent to defraud creditors is void as to them, and their right to follow the property extends to its proceeds or other form of property into which the fraudulent grantee may have converted it. If the funds which the plaintiff seeks to subject to the payment of his debt was the proceeds of the property, the evidence was admissible and its exclusion error. The main question in the case, therefore, is, 'Was the money due from the insurance company the proceeds of ⁴²² the property?' We think this question must be answered in the negative. Insurance is a contract of indemnity. The insurer agrees for a consideration to pay to the insured a stipulated amount in case the latter shall sustain a loss or damage in consequence of the happening of some event or contingency contemplated by the contract. It is a personal contract and does not run with the title to the property:

Cummings v. Cheshire County etc. Ins. Co., 55 N. H. 457; *May on Insurance*, secs. 1, 6. The money which the insurance company agreed to pay to Mrs. Craft was not payable as a price for the property, and its payment would not operate to convert the property into a fund. It was her personal interest in the property which was insured, and the agreement was to pay to her personally a certain amount in case of injury to her interest from a specified cause. That she had an insurable interest is conceded, and even if it were not conceded, is settled by the adjudications. The fund which the plaintiff seeks to reach does not in any sense represent the property. Therefore, it cannot be taken for the husband's debt, as the property itself might have been. The fact that the transaction by which her interest was created might have been avoided by her husband's creditors, gives them no claim to money payable to her as compensation for the destruction of that interest upon a contract which she had the right to make which in no manner affected the interest of her husband, and in consequence of which no injury could result to those creditors: *Lerow v. Wilmarth*, 91 Mass. 382; *Bernheim v. Beer*, 56 Miss. 149; *McLean v. Hess*, 106 Ind. 555, 7 N. E. 567; *Nippe's Appeal*, 75 Pa. St. 472."

We agree, therefore, with the circuit court, that the defendant company is liable upon the policy, and that Carrie Steinmeyer, the insured, is entitled to receive the proceeds thereof. This renders it unnecessary to consider any further the exceptions.

The judgment of the circuit court is affirmed.

Insurance.—Although premises have been conveyed to the insured without consideration, and for the fraudulent purpose of placing them beyond the reach of the grantor's creditors, this is no defense to the insurer under a policy providing that it shall be void if the interest of the insured is other than the unconditional and sole ownership: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745, 62 N. W. 877.

A *Contract of Insurance* is personal as between the insured and insurer and strangers thereto cannot acquire in their own right any interest in the insurance money, except through an assignment or some contract with which they are connected: *Shadgett v. Phillips & Crew Co.*, 131 Ala. 478, 90 Am. St. Rep. 95, 31 South. 20.

STATE v. SHAW.

[64 S. C. 566, 43 S. E. 14.]

APPELLATE PRACTICE—**New Trials**.—The supreme court may grant a new trial in a criminal cause where there is no evidence to support the verdict. (p. 818.)

MURDER Committed in the Chastisement of a Child.—Though one stands in loco parentis toward a child who dies as the result of injuries inflicted on him through chastisement, the crime, if any, is not necessarily manslaughter, but the jury may return a verdict of murder if warranted by the evidence in drawing the inference that the purpose or intent was to take life. (p. 819.)

Indictment for murder; verdict of guilty with a recommendation of mercy. The defendant appealed.

Lee & Moise, for the appellants.

Solicitor John S. Wilson, contra.

⁵⁶⁷ GARY, J. The record contains the following statement of facts: "The defendant, appellant, was indicted for the murder of Nathaniel Williams, a boy in his employ as a servant, whose death he caused by whipping him. He was tried before his honor, Judge J. C. Klugh, and a jury, at Sumter, at the June term, 1902, of the court of general sessions. The state put in evidence the small leather strap with which the whipping was done, a proper instrument for chastisement; but the contention on the part of the state was that the whipping was cruel, immoderate and excessive, causing the death of the boy, and hence that the defendant was guilty of murder. The deceased was a stout-built boy, aged about twelve or thirteen years, bright and intelligent, ⁵⁶⁸ and in good health. He was at the time of his death, and had been for four or five years prior thereto, in the employ and service of the defendant, working for and waiting upon him about his dwelling and store and clerking for him occasionally. The whipping occurred on Saturday, November 9, 1901, for a petty theft committed on the previous Thursday. The defendant's defense was the plea of not guilty; that the chastisement was moderate and proper, and that the boy's death was wholly unintentional and through misfortune; that at most it was a case of manslaughter. The jury found the prisoner guilty of murder with a recommendation to mercy.

"Defendant's counsel moved before his honor upon the minutes for a new trial upon the ground that the verdict of the jury was not warranted by the evidence; that there was abso-

lutely no evidence of murder or malicious homicide in the case to sustain the verdict. That the defendant having the lawful right to inflict moderate chastisement, if he inflicted the same and death ensued, it was at most manslaughter and not murder; and hence that the conviction was illegal and the verdict should be set aside. After hearing argument from the defendant's counsel, the presiding judge overruled the motion, and sentenced the prisoner to imprisonment for life in the state penitentiary. Due and timely notice of intention to appeal to the supreme court was served upon the solicitor."

The following are the appellant's exceptions: "1. For that his honor, the presiding judge, erred, as matter of law, it is respectfully submitted, in refusing defendant's motion for a new trial, when there was no testimony whatever in the case to sustain the conviction of the prisoner of the crime of murder: 2. For that his honor, the presiding judge, erred, as matter of law, it is respectfully submitted, in refusing defendant's motion for a new trial, when the evidence in the case went no further than to make out, at most, a case of manslaughter."

569 The first question argued by the appellant's attorneys was whether this court had the power to grant a new trial on the ground mentioned in the exceptions. Whatever doubts may heretofore have existed as to the power of the supreme court to grant a new trial when there is no evidence to support the verdict, the rule is now well established by recent cases that it has such power. The reason for the rule is, that it is error of law for the circuit court to refuse to set aside a verdict without any evidence to support it.

We will next consider whether there was any testimony whatever from which the jury had the right to infer malice on the part of the prisoner in causing the death of the boy, who died immediately after the whipping. We have never seen a case where the circumstances attending the homicide were more harrowing and revolting. There was testimony that the boy was stripped naked and whipped for one or more hours, with a leather strap having a knot at one end; that there were more than a hundred welts raised upon him, which covered his body from his head to his feet; that after blisters were raised over his body, they were burst by strokes from the strap; that the appellant resumed the whipping after being interrupted for awhile by a visit from a person who had called to see him; that the boy's privates were most horribly mutilated, and that his pitiful appeals for mercy were disregarded. The appellant's attorneys

in their argument contended that the jury could not find the prisoner guilty of murder, "because the appellant here stood toward the deceased in loco parentis, with the lawful right to administer chastisement with a proper instrument for that purpose; and if the chastisement was moderate and death ensued, it was, as a matter of law, excusable homicide, as contended by the appellant; but if, on the other hand, it was immoderate and excessive, as contended by the state, and death ensued, it **was**, as matter of law, manslaughter, and could not under that state of facts be murder. Hence his ⁵⁷⁰ conviction of the crime of murder was illegal, and the refusal by the court of his motion for a new trial was error of law." The general proposition for which they contend is amply sustained by the authorities cited in their argument. The jury, however, in the cases mentioned, must be satisfied that the chastisement was inflicted for the purpose of correction, and not for the purpose of destroying the life of the person upon whom the punishment is inflicted. In the note at page 658 of Archibald's Criminal Practice and Pleading (volume 1), it is said: "If death ensue from a master's chastisement of his slave, inflicted apparently with a good intent for reformation or example, and with no purpose to take life or put it in jeopardy, the law would doubtless tenderly regard every circumstance, which, judging from the conduct generally of masters toward slaves, might reasonably be supposed to have led the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance and the instruments, accompanied by other harsh uses and painful privations of food, clothing and rest, it loses all character of correction in *faro domestico*, and denotes plainly that the master must have contemplated a fatal termination of his barbarous cruelties, and in such case, if death ensue, he is guilty of murder": (Citing *State v. Hoover*, 20 N. C. 365, 34 Am. Dec. 383. The facts and circumstances surrounding the homicide were such as to warrant the jury in drawing the inference that the purpose and intention of the prisoner was to take the life of the boy. If such was the case, the jury had the right to infer malice and to find the prisoner guilty of murder. There being, therefore, some evidence proper to be submitted to the jury upon the question of malice, it was not error of law to refuse the motion for a new trial. The exceptions must, therefore, be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Unintentional Homicide in the commission of an unlawful act is considered in the monographic note to *Johnson v. State*, 90 Am. St. Rep. 571-583. The death of a slave from punishment inflicted by his master in the use of immoderate and unreasonable means will amount to murder. The right of the master to administer reasonable chastisement will not reduce the crime to manslaughter, when death results from acts of excessive and wanton cruelty: Note to *State v. Hoover*, 34 Am. Dec. 386.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SHERRICK v. COTTER.

[28 Wash. 25, 68 Pac. 172.]

APPURTENANCES are Things Belonging to Another Thing as Principal, and which pass as incidents to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto and are a part of the realty. (p. 823.)

FIXTURES AND APPURTENANCES.—A hop-press erected with reference to use in a particular building, and constituting an article of merchandise bought and sold in the markets, though standing in the bailing-room, which is just high enough to receive it, an opening having been left for that purpose, which was floored over when it was placed in the building by a tenant, does not, as between a vendor and vendee, constitute either a fixture or an appurtenance so as to entitle the latter to damages on its removal by a tenant, such removal being accomplished by ripping up a floor and hitching a team to the press and hauling it away. (pp. 824, 825.)

VENDOR AND VENDEE.—Construction of an Agreement to Sell and Convey.—The fact that a purchaser of real property was engaged in the business of hop-raising, and purchased certain real property for the purpose of curing and marketing his product, on which was a hop-house and kiln belonging to a tenant, cannot vary the agreement to sell so as to include therein a hop-press situate in one of the rooms of such house. (p. 825.)

H. G. Rowland, for the appellants.

A. R. Titlow, for the respondents.

24 **FULLERTON, J.** On October 2, 1899, the appellants entered into an agreement with the respondents by the terms of which they agreed to convey to the respondents, by a good and sufficient warranty deed, a certain tract of land, specifically described, containing about one acre, "together with the appurtenances." The consideration agreed upon was seven hundred dollars, of which twenty-five dollars was paid on the execution

of the agreement, and the balance was agreed to be paid on the first day of January, 1900. The contract contained an express promise on the part of the respondents to purchase the land described, and to make the deferred payment, with interest, at the time agreed upon. At the time the agreement was entered into there was upon the land a hophouse or kiln, constructed and used for the purpose of housing and curing hops, in which was a hop-press and certain stoves and stove pipes; the former used for bailing hops, and the latter for drying the same. The premises at the time of the sale were in the possession of one Stewart, who was holding under an agreement with the appellants by the terms of which he was to quit and surrender possession of the premises when the same should be sold by them. On the morning of the 3d of October, 1899, the respondents sent their agent to take possession of the property. The agent entered the building and started fires in the stoves. Shortly thereafter Stewart came to the building, and, while conceding the right of the respondents to enter and take possession of the real property, claimed the stoves and stovepipes and the hop-press as his own property, and shortly thereafter, over the protest of the respondents, removed the hop-press from the building, leaving the respondents in the possession of the remainder of the property. The appellants ²⁷ acquired title to the property from the executor of the estates of James P. and Margaret A. Stewart, in the deed for which the general heirs of the estates joined. This deed was in the usual form. It described the land by metes and bounds, and conveyed the same to the appellants, with the tenements, hereditaments, and appurtenances thereunto belonging, making no reference to personal property. Stewart claimed the hop-press as personal property, contending that it did not, for that reason, pass to the appellants by the deed last mentioned. After the time for making the deferred payment had expired, the appellants tendered to the respondents a warranty deed for the premises, and demanded of them the payment of the deferred part of purchase price. This deed the respondents refused to accept, whereupon another was tendered, describing the land in a slightly different manner, which was likewise refused, the respondents refusing at the same time to pay the balance of the purchase price. Thereupon the appellants brought this action to enforce a specific performance of the contract. The respondents, answering the complaint, admitted the execution of the contract, and sought to counterclaim by way of damages because of the failure of the appellants to deliver to them the

hop-press. After a trial the lower court made findings to the effect that the hop-press was an appurtenant to the land described in the agreement sued upon, and that the respondents were damaged in the sum of three hundred dollars because of the failure of the appellants to deliver the same to them, and entered a judgment and decree requiring the respondents to accept the deeds tendered as a good and sufficient conveyance of the premises, awarding to the appellants the purchase price and interest, after deducting therefrom the amount found as damages.

²⁸ The agreement sued upon was an agreement to convey a certain described tract of land, with the appurtenances thereunto belonging. Whatever would pass under a deed containing a like description and a like term was agreed thereby to be conveyed, but nothing more. A hop-press placed in a building situate upon land is not appurtenant to the land, under any of the accepted definitions of that term.

“Appurtenances,” says Rothrock, J., in *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719, “are things belonging to another thing as principal and which pass as incident to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto, and are part of the realty.”

And Mr. Justice Story, after saying that certain things may pass by grant, as appurtenances, if such be the clear intent of the parties as gathered from the terms of the instrument of conveyance, says: “In a case, therefore, where the words of a grant pass land ‘with its appurtenances,’ the law will, in the absence of any controlling words, deem the word ‘appurtenances’ to be used in its technical sense; and that construction will not be displaced until it is made manifest from other parts of the grant that some other thing was actually intended by the parties. I say, until it is made manifest; by which I mean, clearly and definitely ascertained that the word is used in another sense. I add, also, from other parts of the same grant; for it is not open to parol evidence to explain or vary the legal sense. If there is nothing in *rerum natura*, upon which the word can operate, that does not entitle the court to desert the legal sense. It has been said by the counsel for the defendant, that there were buildings on No. 2, to which the word ‘appurtenances’ is commonly applied. But such buildings are in no just sense ‘appurtenances’; but if annexed ²⁹ to the freehold, they are a parcel of the land, and pass as such by the deed. It is not, however, necessary to

show that there are things granted, to which the word applies. It is often thrown in by conveyancers without any actual knowledge of the premises, to avail, as far as it may avail, by way of cautionary enlargement of the principal grant, if there be anything on which it may operate. If there be in fact no appurtenances, then the word, like other expletives in a deed, is merely nugatory": *United States v. Harris*, 1 Sum. 21, Fed. Cas. No. 15,315.

In the agreement before us there is nothing which indicates that the word "appurtenant" was used other than in its technical sense. Whether, therefore, the hop-press was part of the property agreed to be conveyed cannot be gathered from any consideration of the clause of the agreement mentioning appurtenances, but must be gathered from another and entirely different consideration, viz., was it so attached to the realty as to make it a part thereof? In other words, was it what in law is denominated a "fixture?" On this question the trial court made no finding, nor does it appear that the evidence was specially directed thereto. Enough does appear, however, to show that hop-presses of this character are constructed without reference to use in any particular building, but are articles of merchandise, bought and sold in the markets, and having of themselves a market value, and that this press did not differ in kind from the ordinary hop-press. Articles of this character have generally been held in this state to be personal property, which do not pass by a grant of the fee of real property, though situate in a building erected thereon at the time of the grant, if they can be removed without material injury to the fee: See *Neufelder v. Third St. etc. Ry. Co.*, 23 Wash. 470, 83 Am. St. Rep. 831, 63 Pac. 197, ³⁰ where the cases will be found collected. As to the manner in which this particular press was attached to the building, the only witness who testifies on the subject says that the bailing-room was just high enough to receive the press, so that it came even with the top of the upper floor: that an opening was left to receive the press, which was floored over, apparently after the press was put into the building; and that the persons removing the press (to use the language of the witness) "ripped that up, and hitched the team to it [the press] and drew it away." It was not shown that this ripping up of the floor covering the opening caused any material injury to the building, and, under the rule of the cases above cited, we do not think the press was so attached to the building as to make it any part of the realty. This being so, it was not included

within the agreement to convey, and the respondents could not, therefore, recover damages for the appellants' failure to deliver possession of it to them.

We have not overlooked the evidence on the part of the respondents to the effect that they were extensively engaged in the business of hop raising, and that they purchased this property for the purpose of curing and otherwise preparing for market their product, and that a hop-press is a necessary part of the machinery required for that purpose. But this cannot avail the respondents. There is no pretense that there was any fraud or mistake in the execution of the agreement to convey, or that it is either uncertain or ambiguous in its terms; nor was it shown that there was any separate collateral agreement, independent of the writing, by which the appellants agreed to sell them the press. What the appellants agreed to convey must, therefore, be gathered from the writing ³¹ itself. Its legal sense cannot be explained or varied by parol evidence.

The judgment appealed from is reversed in so far as it allows damages to the respondents, and the cause is remanded, with instructions to modify the judgment by disallowing such damages, and allowing the appellants to recover for the full amount of the deferred part of the purchase price, with interest, according to the terms of the agreement.

Reavis, C. J., and Hadley, Dunbar, Anders, and Mount, JJ., concur.

An Appurtenance is that which belongs to something else as an adjunct or appendage of such moment that the thing to which it attaches cannot be enjoyed without its use: *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59. As to what will pass as an appurtenance, see the monographic note to *Scott v. Moore*, 81 Am. St. Rep. 764-771.

As to What are Fixtures, see the monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696; and the recent cases of *Baker v. McClung*, 198 Ill. 28, ante, p. 261, 64 N. E. 701; *Salley v. Robinson*, 96 Me. 474, 90 Am. St. Rep. 410, 52 Atl. 930; *McFarlane v. Foley*, 27 Ind. App. 484, 87 Am. St. Rep. 264, 60 N. E. 357; *Gurnsey v. Phinizy*, 113 Ga. 898, 84 Am. St. Rep. 270, 39 S. E. 402; *Neufelder v. Third St. etc.* Ry., 23 Wash. 470, 83 Am. St. Rep. 831, 63 Pac. 197.

STATE v. SUPERIOR COURT.

[28 Wash. 35, 68 Pac. 170.]

BANKRUPTCY ADJUDICATION—Effect of on the State Courts.—An adjudication in bankruptcy in the national courts does not deprive the state courts of jurisdiction to proceed against the bankrupt in a suit previously pending therein. (p. 827.)

BANKRUPTCY PROCEEDINGS—Effect of Against Receiver-ships.—If a state court acquires jurisdiction over bankrupts and appoints a receiver of their property, though the suit is based on a claim from which a discharge in bankruptcy could be given, a subsequent adjudication of bankruptcy in the national courts does not oust the state courts of authority to proceed with a confirmation of the sale of property made by such receiver. (p. 828.)

J. H. Finch, for the relator.

Richard Saxe Jones, for the respondent.

³⁵ REAVIS, C. J. The relator, Heckman, applied for an alternative writ of prohibition to the superior court of King county. He stated that a suit was pending in the superior court, wherein William Curtis was plaintiff and relator and Hanson were defendants, and Larsen was receiver: that relator was interested beneficially therein; that on the seventeenth day of January, 1902, relator and Hanson as copartners, were adjudged bankrupts in the United States district court; that said suit in the superior court was founded upon a claim against said copartners from which a discharge in bankruptcy could be given, and that said suit was pending at the time of the filing of the petition in bankruptcy. That thereafter, on the sixth day of March, 1902, the said receiver moved the superior court for an order confirming the sale of certain property for the sum of twenty-four thousand dollars, which property was owned by relator and Hanson as copartners and then in the custody of the receiver, ³⁶ and which sale was going to be made after the adjudication that such copartners were bankrupts, and after knowledge on the part of the receiver and of the superior court of the adjudication in bankruptcy, and after the appearance of relator in the superior court and his objection to confirmation of such sale on the ground that the court was without jurisdiction to further proceed. There were some other statements relative to the action of the superior court in regard to time for the examination of the receiver's accounts and matters of like nature. These are deemed immaterial to notice. When the application for the writ was made, it was suggested by counsel for relator

that opportunity had not been afforded relator to ascertain fully all the facts relating to the procedure in the superior and the bankruptcy courts. An order to show cause why the writ should not issue was granted. Upon the return of the order it appears that the suit in the superior court was commenced in July, 1901, against the said copartners, and the receiver, Larsen, appointed therein under the direction of the court, took possession of the property of the copartnership, and, after the adjudication that the copartners were bankrupts, the district court of the United States temporarily restrained the receiver Larsen from further proceedings, but thereafter dissolved such order, and that the superior court is proceeding to close such receivership.

The only inquiry here is into the jurisdiction of the superior court in the premises. There seems to have been for some time considerable uncertainty in the view of the courts as to the effect of the enactment of the federal bankruptcy law upon the jurisdiction of the state tribunals when insolvent debtors became involved in such proceedings, but it seems to be now settled that the mere enactment ³⁷ of the bankruptcy law does not oust the state courts of their jurisdiction: *State v. Superior Court*, 20 Wash. 545, 56 Pac. 35; also annotations in 45 L. R. A. 177. The observation at the conclusion of the opinion in this case, "Unquestionably, upon such adjudication the power of the state court to proceed further ceases," was not involved in the decision, and such expression, without qualification, is incorrect. It is also determined by the highest authority that the adjudication of bankruptcy in the federal court of persons who may be parties in a suit pending in the state court does not of itself deprive the state court of jurisdiction in such case. The supreme court of the United States in *Eyster v. Gaff*, 91 U. S. 521, observes: "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. . . . The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts."

The duty of the state court is very well expressed by the supreme court of Georgia in *Freeman v. Fort*, 52 Ga. 371: "When the assignees of the bankrupts shall make a proper case which will authorize the bankrupt court to enjoin the complainants

in the creditors' bill from proceeding in the state court to have their respective claims and liens adjudicated in that court, and shall obtain the sanction of the bankrupt court for that purpose, then, and not until then, would it be the duty of the state court to turn over to the assignees the assets in its custody, to be ³⁸ administered by the bankrupt court. Inasmuch as the state court had acquired the jurisdiction and custody of the defendant's property and effects for the purposes specified in the creditors' bill before they were adjudged bankrupts, the assignees cannot accomplish the object sought by them on a mere motion, without first instituting regular proceedings for that purpose in the bankrupt court."

Upon the facts shown, the superior court is within its jurisdiction, and the writ is denied.

Anders, Hadley, Fullerton, Mount, Dunbar, and White, JJ., concur.

Bankruptcy.—A court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay further proceedings therein, though it may do so if justice requires; the action is not absolutely barred, and the court has power to proceed to judgment: *Rosenthal v. Nove*, 175 Mass. 559, 78 Am. St. Rep. 512, 56 N. E. 884. See, in this connection, *R. H. Herron Co. v. Superior Court*, 136 Cal. 279, 89 Am. St. Rep. 124, 68 Pac. 814; *Turentine v. Blackwood*, 125 Ala. 436, 82 Am. St. Rep. 254, 28 South. 95.

FIRST NATIONAL BANK OF SNOHOMISH v. PARKER.

[28 Wash. 234, 68 Pac. 756.]

COUNTERCLAIM—Construction of Statute Authorizing.—The general rule is that a statute authorizing a counterclaim should be liberally construed. (p. 830.)

COUNTERCLAIM.—In an Action to Foreclose a Mortgage the defendant may assert as a counterclaim damages suffered by him in a previous suit by the mortgagor for the possession of the premises, in which he was placed in such possession and so remained until the final determination of that suit, if the statute authorizes a counterclaim "in an action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." (p. 830.)

MORTGAGES—Option to Foreclose—Statute of Limitations.—A provision in a mortgage that upon default in the payment of interest, the right to foreclose shall immediately accrue, is for the benefit of the mortgagee and cannot be taken advantage of by the mortgagor. Hence, the statute of limitations does not run in favor of the

latter from such default where the mortgagee does not elect to avail himself of it. (p. 831.)

PRACTICE.—The Objection that the Judge Pro Tempore who tried the case was not sworn cannot be urged on appeal when not seasonably raised in the trial court. (p. 831.)

J. A. Coleman, for the plaintiff.

George E. Banks, for the defendant.

235 REAVIS, C. J. Action to foreclose a mortgage on certain real estate in Snohomish county. The complaint is in the usual form, upon a mortgage executed to the Lombard Investment Company, and by that company thereafter assigned to plaintiff, appellant. The allegations of the complaint were admitted by the defendant and appellant Parker, the mortgagor. Two affirmative defenses and a counterclaim were interposed by said defendant. The first defense was that a provision in the mortgage provided that upon the default of the payment of the interest or any part when due the right of foreclosure should immediately accrue, that such default had occurred more than six years before the commencement of the action, and that by reason thereof the action was barred by the statute of limitations. The second defense was that the plaintiff was not the real party in interest. The counterclaim is that plaintiff, through its cashier, Snyder, brought an action in 1896 for the possession of the mortgaged premises against the defendant, and in said action had a writ of restitution issued; that plaintiff thereupon went into possession of the premises, and retained such possession until the final determination of the action, when defendant was restored to the possession of the premises; that by reason of plaintiff's retention of the possession of the mortgaged premises defendant was damaged in the sum of one thousand nine hundred and seventy dollars, and the specification of the damages sustained is made. Plaintiff demurred to the affirmative **236** defenses and counterclaim. The demurrer of the defense was sustained and that to the counterclaim overruled. A jury was called to assess the damages alleged in the counterclaim. The court, after reducing the assessment of damages to some extent, affirmed the finding of the jury, and allowed one thousand dollars counterclaim, and decreed foreclosure for the remainder due upon the mortgage. Both parties have appealed.

Plaintiff assigns as error the overruling of the demurrer to the counterclaim, and the reduction of the amount due upon the mortgage in the amount of the counterclaim. It is main-

tained by counsel for plaintiff that the demurrer to the counterclaim should have been sustained, that the allowance of any counterclaim in the action was error, and that the damages specified were not the subject of counterclaim within Ballinger's Code, section 4913. Subdivision 1 of the section permits a counterclaim "in an action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The construction of this section and similar language in other codes has not been uniform or clear: See Pomeroy's Remedies and Remedial Rights, section 775; *Collier v. Ervin*, 3 Mont. 142.

The general rule is that the statute authorizing a counterclaim should be liberally construed. It is said in 22 American and English Encyclopedia of Law, page 396: "In actions in which either a contract or a transaction which is not a contract is set forth as the foundation of the plaintiff's claim, counterclaims may be interposed which neither arise out of the same contract nor out of the same transaction, if they are connected with the subject of the action. The subject of an action is either the property which is thereby sought to be recovered or alleged to be injured, or a violated right or the right to enforce or maintain which the action is brought."

²³⁷ It would seem in the present action that virtually the same parties are in controversy as were in the case of *Snyder*, who is the cashier of plaintiff, against *Parker*, and reported in 19 Wash. 276, 67 Am. St. Rep. 726, 53 Pac. 59. In that case the plaintiff claimed the premises under a deed absolute in form, which, however, was adjudged to be a mortgage and only a lien on the premises. In the case at bar the action is to foreclose a lien upon the same property. It would seem that, by the acts authorized by the plaintiff in taking and holding possession of the premises and which were found to be injurious, the subject matter of the lien was damaged, and that the defendant is entitled to such damages, and we think in this case that the realty may properly be held as connected with the subject of the action: *Metropolitan T. Co. v. Tona-wanda etc. R. R. Co.*, 43 Hun, 521; *Tinsley v. Tinsley*, 15 B. Mon. 454. Upon the record here we are not disposed to disturb the finding of the amount of the counterclaim.

The errors assigned by the defendant in sustaining the demurrers to the affirmative defenses are not well taken. The general rule, that such stipulations as appear in the mortgage

providing for default and that the cause of action may accrue upon nonpayment of interest, is that such default must be claimed by the mortgagee, or it is waived. It is for the benefit of the mortgagee, and cannot be taken advantage of by the mortgagor. The objection that the judge pro tempore was not sworn is not available here, because not raised in the record by seasonable objection: See *State v. Sachs*, 3 Wash. 691, 29 Pac. 446.

The judgment is affirmed. Neither party will recover costs on appeal.

White, Mount, Fullerton, Hadley and Dunbar, JJ., concur.

Limitations.—Though the holder of a note has exercised his option of considering the whole amount due for nonpayment of interest, he may subsequently waive the right; and if he does so, the statute of limitations does not begin to run against him prior to the date originally fixed for the maturity of the note: *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624. But see *San Antonio etc. Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 65 S. W. 665.

Counterclaim.—Statutes giving defendants the right to assert counterclaims should be construed liberally: *McHard v. Williams*, 8 S. Dak. 381, 59 Am. St. Rep. 766, 66 N. W. 930; monographic note to *Woodruff v. Garner*, 89 Am. Dec. 482-492. But see *Drennen v. Gilmore Bros.*, 132 Ala. 246, 90 Am. St. Rep. 902, 31 South. 902.

STATE v. SUPERIOR COURT.

[28 Wash. 317, 68 Pac. 957.]

STATUTES—Title of—When not Sufficiently Expressed.—A statute entitled "An act to amend section 5645 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency," does not comply with the section of the constitution providing that no bill shall embrace more than one subject, and that shall be expressed in the title, and is therefore void. (p. 834.)

STATUTES.—The Title of an Amendatory Act Must Contain some words which indicate the theme or provision of which the act sought to be amended treats. (p. 838.)

Piles, Donworth & Howe, for the relator.

William Hickman Moore and Kerr & McCord, for the respondents.

318 HADLEY, J. This is an original application in this court for a peremptory writ of mandate directed to the superior

court of King county and to the Honorable Arthur E. Griffin, judge thereof. The relator is a corporation authorized to construct and operate street and other railways in the state of Washington. By ordinance of the city of Seattle a franchise was granted to said relator to maintain and operate a street railway upon Fourth Avenue south and other streets in said city. In December, 1901, the relator filed a petition in the office of the clerk of the superior court of King county for the ascertainment of compensation and appropriation of certain rights in connection with the construction of a trestle, bridge, and roadway, in said Fourth avenue South, which structure, or a similar one, was required by the ordinance aforesaid. The ordinance requires that where relator's railway shall cross the tracks of the Columbia and Puget Sound Railroad Company, on Fourth avenue South it shall be elevated a reasonable height above the present grade of said tracks. In said petition Charles B. Smith and Tucker-Hanford Company, a corporation, were and are claimants and respondents. That petition recites, among other things, that the claimants are the owners of certain lots which lie immediately south of the tracks of said Columbia and Puget Sound Railroad Company and on the west side of Fourth avenue South; that in order to comply with said ordinance, and to avoid a dangerous grade crossing of the tracks of said railroad company, which operates a steam railroad, it is necessary for relator to construct a trestle and truss bridge for supporting ³¹⁹ its tracks and roadway above the grade of said railroad, and that such structure must necessarily be elevated above the natural surface of the ground in front of the claimants' premises. The character of the proposed structure is described in the petition, and it is alleged that said claimants claim that they will be damaged by the construction and operation of the same. It is alleged that the use for which such bridge is to be constructed is a public use; that public necessity requires the prosecution of said enterprise, and that it is necessary for said petitioner in the operation of its franchises and the exercise of its public duties. The petition prays that a jury may be impaneled to ascertain and determine the compensation to be paid to the claimants. Thereafter the petition came on for hearing, and the court found that the contemplated use of said structure is a public use, and that public interest requires the construction and maintenance of said bridge, and entered an order accordingly. The court further ordered that upon a given date a jury

should be impaneled to ascertain the amount of damages which will result to the claimants by reason of the construction and maintenance of said proposed structure. At the time of entering said decree the claimant Charles B. Smith, in open court, gave notice of appeal from said order. Thereafter the relator filed in the office of the clerk of the superior court a bond conditioned as required by section 5646 of Ballinger's Code, which bond was approved by said clerk; and the claimant Charles B. Smith, on the same day, filed an appeal bond in the sum of two hundred dollars. Afterward the said claimant moved the court for a stay of proceedings in said superior court pending the determination by the supreme court of the aforesaid appeal, the ground of said motion being that by reason of the said ³²⁰ appeal the superior court had no jurisdiction to proceed with the trial of the question of damages and compensation while said appeal is pending. The court granted said motion, and entered an order whereby it was ordered that by reason of the lack of jurisdiction of said court, on account of the pendency of said appeal, no jury shall be impaneled in said cause to determine the question of compensation, and that said cause shall not be tried before said court on said question until the determination of said appeal by the supreme court. At the time of the making of the last-named order, the relator objected, and demanded that a jury be impaneled, and that the question of damages be tried and determined in accordance with the order theretofore made, which demand was denied solely for the reason that the court was of the opinion that it had no power to proceed with said trial while said appeal is pending. The relator duly excepted to said order at the time it was made, and said exception was allowed. Thereupon application was made to this court for a peremptory writ of mandate directed to the superior court, commanding that said court shall immediately cause a jury to be impaneled and proceed to try the question of damages, notwithstanding said appeal.

It is conceded that mandamus is the proper remedy, if the relator is entitled to relief at all in the premises. A number of questions are discussed by counsel, but we think one question must be decisive of this case, and we will therefore confine ourselves to the discussion of that alone. By an act of the legislature found in the Session Laws of 1901, at page 213, it is provided that either party may appeal from the order of the court adjudicating or refusing to adjudicate that the contem-

plated use of property sought to be appropriated is really a public use, and ³²¹ ordering or refusing to order a jury to be summoned for the assessment of damages. The provision is contained in what purports to be an amendment to section 5645 of Ballinger's Annotated Codes and Statutes of Washington. The act is entitled as follows: "An act to amend section 5645 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency." Relator's counsel urge that the said act is unconstitutional and void for the reason that the subject of the act is not expressed in the title. Article 2, section 19, of the constitution of Washington is as follows: "No bill shall embrace more than one subject and that shall be expressed in the title." The above constitutional provision is clear, direct, and mandatory in its nature; and, if the legislative act in question violates that provision, it must be held void. Manifestly, under the constitutional requirement the title of an act must express the subject with which the act deals. This rule is so universal, and the reason for it has been so generally discussed, that it seems unnecessary to dwell upon it here. The wisdom of the rule suggests itself, in that the reader, whether a member of the legislature or otherwise, may, by a mere glance at a few catch words in the title, be apprised of what the act treats, without further search. Does the title of the act in question contain such a statement of the subject matter? It will be observed that it merely refers to a certain section of Ballinger's Code, which it purports to amend, and no intimation is given as to the subject matter of the section which it is sought to amend. It is clear that the reader cannot determine from the title what subject is treated by the section in Ballinger's Code or by the amending act itself. This, we think, is in violation of the constitutional requirement. No elaborate statement of the ³²² subject of an act is necessary to meet the spirit of the constitution. A few well-chosen words, suggestive of the general subject treated, is all that is required. But we think the absence of any such suggestive words is fatal, and that to hold otherwise would be to utterly ignore the constitutional provision. In *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, the constitutionality of an act was assailed because of an alleged defective title. The title was as follows: "An act relating to pleadings in civil actions and amending sections 76, 77 and 109 of the Code of Washington of 1881." The act was held to be valid for the reason that the title did state a subject, to wit: "An act relating

to pleadings in civil actions." It is true the learned writer of the opinion went further, and stated that as the Code of 1881 is a valid and binding body of laws, arranged and consecutively sectionized under authority of the legislature, a section of such Code may be amended by an act under a title which simply provides for the amendment of such section by its number, without any designation of the subject matter of the section to be amended. But such statement was not necessary for the decision of that case, inasmuch as it was determined that the title then under consideration did contain a clearly defined subject. It is suggested that the argument there used, as applying to acts amending a section of the Code of 1881, does not apply with equal force here. That Code, as stated above, was adopted as an authoritative body of laws. Its consecutive sections were arranged by authority of the legislature and afterward re-enacted by that body, thereby making not only its contents, but the numbers and arrangement of the sections, the act of the legislature. It is very properly suggested by counsel that Judge Ballinger has prepared a Code which is of great convenience to the bench and bar of the state, but that Code cannot be ³²³ said to be clothed with authority equal to that of the Code of 1881. The latter is a purely legislative product, while the former is a private compilation, which has simply received the approval of the legislature as an official compilation of existing statutes, but of no greater authority than all other existing official compilations of session laws of the state: See Sess. Laws 1899, p. 109, sec. 1. Ballinger's Code was not enacted by the legislature, as was the Code of 1881, but was only approved as a compilation of laws for the purposes of reference, as provided in section 2 of the act of 1899, above cited. But whether the argument in *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, applies with equal force here or not, the fact remains that the only question really decided in that case was that, aside from the reference to the section, the title contained sufficient words to indicate the subject, and that the act was therefore constitutional. In this connection, we desire to be distinctly understood as holding that by authority of the act of 1899, *supra*, it is entirely proper for the legislature to refer to sections of Ballinger's Code in the title of an act; but such mere reference to the sections of a private compilation of laws, although ably and carefully prepared, and ever recognized by the legislature as an official compilation, cannot take the place

of the constitutional requirement that the title of an act shall contain some statement indicating the actual thing of which the law treats.

In *State v. Halbert*, 14 Wash. 306, 44 Pac. 538, it was held that an act of 1885-86, attempting to amend a section of the code of 1881 by mere reference to its number in the title of the amending act, was void. The amending act was passed by the territorial legislature, and it was held that under the authority of *Harland v. Territory*, 3 Wash. Ter. 131, 13 Pac. 153, and *Rumsey v. Territory*, 3 Wash. Ter. 332a, 21 Pac. 152, the act was void. ³²⁴ It was urged in the case that *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, had adopted a rule contrary to that announced by the supreme court of the territory, but the court based its decision upon the ground that the effect of the territorial decisions was to render the act void. The constitution provided that all the laws then in force in the territory which were not repugnant to the constitution should remain in force until they should expire by their own limitation, or be repealed by the legislature; and it was therefore held that the law was of no force at the time of the adoption of the constitution, because it had theretofore become void by virtue of the territorial decisions. In the course of the opinion the court merely referred to what was said in *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, without expressing either approval or disapproval thereof, and, having based its decision upon the ground above stated, did not pass upon the precise question presented here. The same question which was involved in *State v. Halbert*, 14 Wash. 306, 44 Pac. 538, was also presented, and the same rule adopted, in the following cases: *State v. Dillon*, 14 Wash. 703, 46 Pac. 1119; *Poncein v. Furth*, 15 Wash. 201, 46 Pac. 741; *State v. Smith*, 15 Wash. 698, 46 Pac. 1119; *In re Nolan*, 21 Wash. 395, 58 Pac. 222.

In *Parker v. Superior Court of Snohomish County*, 25 Wash. 544, 66 Pac. 154, an application was made to this court for a writ commanding the court below to refrain from further proceedings in a condemnation case, it being claimed that an order adjudicating the question of public use had been made, from which order the appeal had been taken under the authority of the act of 1901 now under consideration. The court declined to order the writ issued, and based its decision upon the ground that the order from which the appeal was taken was not an order adjudicating the question of public use, but ³²⁵ was only an order overruling a demurrer to a complaint, and was therefore not a final order which was ap-

pealable. The constitutionality of the act of 1901 was not raised or considered in that case.

As far as we are advised, the above is a review of all the decisions of this court which may be said to bear upon the subject. It will thus be seen that the precise question involved here has not before been squarely presented to this court for decision. The argument in *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, heretofore mentioned, is a criticism of the opinion written by Mr. Justice Turner in *Harland v. Territory* 3 Wash. Ter. 131, 13 Pac. 453, but, as already stated, the criticism was not necessary to support the real ground of the court's decision. Yet whatever may be said of the argument, it has a distinguishing feature from the case at bar. The argument had the support of the fact that the amending act then under consideration referred to a section that had been adopted as such by a previous legislature, and in making reference to it that body was referring to something that had been theretofore created by it, and which existed by reason of its own authoritative act. In this case, however, the reference is to a section of a private compilation, the arrangement of which was not created by the legislature. But under any view of the former case the mandate of the constitution seems to us so plain that we conceive it to be our duty to hold squarely that a mere reference to a section in the title of an act does not state a subject. What is the significance of the word "subject." in this connection? Webster defines it as "that of which anything is affirmed or predicated; the theme of a proposition or discourse; that which is spoken of." To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse, it seems to us, is not sustained by the ordinary understanding of those terms. ³²⁶ The theme of a legislative act is that of which it treats, and an amending act treats of the theme covered by the act sought to be amended. We therefore see no escape from the conclusion that the title of an amending act must contain some words which indicate the theme or proposition of which the act sought to be amended treats.

There is some conflict of authority upon this subject, but we believe the rule here announced is the more wholesome and reasonable one; that such was intended by the constitution, and will more effectually prevent hasty and ill-considered legislation. Judge Cooley, in his work on Constitutional Limitations, sixth edition, page 97, observes that constitutional provisions similar to the one in our constitution are recognized

by the highest judicial tribunals in nearly all the states as mandatory and to be enforced by the courts. Further discussing the reasons for these constitutional provisions and the evils sought to be remedied thereby, he observes as follows: "It may therefore be assumed as settled that the purpose of these provisions was: 1. To prevent hodge-podge or 'log-rolling' legislation; 2. To prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and 3. To fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire": Cooley's Constitutional Limitations, 6th ed., pp. 171, 172.

The following cases, in the application of this principle as argued in the opinions, support the rule that the title of an amending act is insufficient when it merely refers to a numbered section or numbered chapter, without further ³²⁷ indicating its subject: *Webster v. Powell*, 36 Fla. 703, 18 South. 441; *The Borrowdale*, 39 Fed. 376; *People v. Hills*, 35 N. Y. 449; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625; *Feibleman v. State*, 98 Ind. 516; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. 469.

In the cases of *Webster v. Powell*, and *The Borrowdale*, supra. *Harland v. Territory*, above mentioned, is cited with approval. Of that case, Judge Deady, in the case of *The Borrowdale*, says: "*Harland v. Washington Territory*, 3 Wash. Ter. 142, 13 Pac. 153, is a case directly in point. It was there held that the 'subject' of the act was not expressed in such title, and that the act was, therefore, void. The question is thoroughly considered in the opinion of the court, and the conclusion maintained by argument and authority which are unanswerable."

In *People v. Hills*, 35 N. Y. 449, the title in question referred only to a certain numbered chapter, which contained many sections. The learned writer of the opinion observed that, "If the framer of the act of March 24, 1865, had entitled it an act to amend section 290 of chapter 389 of the Laws of 1851, a reader, by referring to that section, might have obtained from its title some notion of what the subject matter of the act related to"; thus intimating the possibility that if

the reference had been made to a distinct section the holding might have been otherwise. But in the later opinion of *People v. Briggs*, 50 N. Y. 553, the same court said: "The case of *People v. Hills*, 35 N. Y. 449, is entirely unlike this. There, the title was 'An act to amend chapter 389 of the Laws of 1851.' That act was properly held invalid because no subject was expressed in the title. The learned judge, who delivered the opinion in that case, ³²⁸ intimated that if the particular section in the act proposed to be amended had been referred to in the title, it would have been good; but I doubt whether that would have cured the defect. The constitution requires that the subject should be expressed. That title expressed no subject, but only contained a reference where the subject might be found. If the title of the act proposed to be amended had been inserted, it would have been free from the constitutional objection."

The above statement that such a title contains no subject, but only a reference to where the subject may be found, is approved and emphasized in *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625. The last statement in the above quotation, that, if the title of the amending act had contained the title of the act proposed to be amended, it would have been sufficient, was also directly held in *State v. Algood*, 87 Tenn. 163, 10 S. W. 310. In *Feibleman v. State*, 98 Ind. 516, the court observed: "If a section in the revision of 1881 may be amended by simply referring to it by number, so may a law of any session of the legislature be amended in the same way by a title like this: 'An act to amend section 3 on page 46 of the Acts of 1883.' This would lead to looseness and uncertainty in statutory amendments, which it was the main object of the constitutional provision under consideration to prevent."

We are not unmindful that every reasonable presumption not in conflict with constitutional requirement should be indulged in favor of the validity of a legislative act. Courts always hesitate to declare a solemn act of a legislature void. But the judicial department is constituted one of the co-ordinate branches of the government. Its duties are clearly defined, and should be fearlessly discharged. For the foregoing reasons the act must be held unconstitutional and void. There being, therefore, no authority for ³²⁹ an appeal from an order adjudicating an appropriation to be of public use and ordering a jury to be impaneled to ascertain the damages, it follows

that there exists here no reason why the superior court shall not forthwith proceed to cause a jury to be impaneled to determine and assess the amount of damages.

Let the writ issue.

Reavis, C. J., and Anders, Mount, Fullerton, Dunbar and White, JJ., concur.

The Titles of Statutes are considered, with reference to their sufficiency under the constitutional requirements, in the monographic notes to Crookston v. County Commrs., 79 Am. St. Rep. 456-486; Bobel v. People, 64 Am. St. Rep. 70-107. And the titles of amendatory acts particularly are considered in the monographic note to Lewis v. Dunne, 86 Am. St. Rep. 267-279; and the recent cases of State v. Davis, 130 Ala. 148, 89 Am. St. Rep. 23, 30 South. 344; Copeland v. Pirie, 26 Wash. 481, 90 Am. St. Rep. 769, 67 Pac. 227.

NORTHERN PACIFIC RAILWAY COMPANY v. HASSE.

[28 Wash. 353, 68 Pac. 882.]

PRESCRIPTIVE TITLE as Against Railroad Right of Way.—A statute of limitations may create, through adverse possession, prescriptive title to lands granted by Congress for a right of way for the construction of a railroad, especially if such statute of limitations declares that the limitations therein prescribed apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. (pp. 842, 843.)

Pruyn & Slemmons, for the appellants.

B. S. Grosseup and A. G. Avery, for the respondent.

354 REAVIS, C. J. Action in ejectment by the Northern Pacific Railway Company, plaintiff, against Hasse and wife, defendants. The complaint is in the ordinary form, and alleges the grant of a right of way of four hundred feet, under the act of Congress of July 2, 1864 (13 Stats. at Large 365); that the defendants are in possession of portions of such right of way on each side of the constructed railway line, which have not been used by the company heretofore for its right of way, and that such possession is wrongful. The answer alleged title in the defendants by adverse possession. At the trial of the cause the facts were undisputed, and, in substance, as follows: That defendants settled upon the premises on May 27, 1883, under a homestead application, made final

proof in the year 1888, and received a patent therefor on the twenty-seventh day of September, 1889; that prior to the year 1886 defendants had constructed substantial improvements, including their dwelling-house, and a substantial portion of the tract was inclosed and cultivated; that in the year 1886 the plaintiff's predecessor, the Northern Pacific Railroad Company, constructed its line of road through the premises; that at the time of the entry of the company upon said premises for construction of its line of road it broke the inclosure of appellants, and entered upon cultivated land, during the temporary absence of defendants; that thereafter it erected crossings joining the exterior fences of appellants as the line ran through, and has since maintained such crossings; that appellants have maintained their complete inclosure of the premises, and farmed and cultivated all the land up to the constructed line, which has ditches ³⁵⁵ upon each side of the track, until the commencement of this action in June, 1900; that defendants have paid the taxes on the entire premises without any deduction for right of way ever since final proof was made; and it is also shown that the railway company has paid taxes on its entire right of way. Upon these facts, the superior court withdrew the cause from the jury, and determined, as a matter of law, that judgment must go for plaintiff. From such judgment in favor of plaintiff, defendants have appealed.

The error assigned is in entering judgment for defendants. It is urged by counsel for defendants that the plea of the statute of limitations should have been sustained, and this is the vital question in the controversy. It will be observed that defendants, in 1886, at the time the entry of the plaintiff was made upon the right of way through the premises, were in actual possession under a homestead application, with an inclosure and improvements. The manner in which plaintiff's predecessor entered was technically forcible. The fencing and improvements certainly belonged to the defendants. In *Flint etc. Ry. Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648, the court declared: "The improvements on the land are certainly his own, and if these or any portion thereof are appropriated, he is entitled to compensation."

But the facts show that the company actually entered upon and has occupied only so much of the right of way as is in actual use for the operation of its line. The defendants have occupied and been in the open possession under a claim of right of the area of land now in controversy since 1883, and for over

ten years had a patent conveying title without reservation. The position assumed by counsel for plaintiff is that the statute of limitations ³⁵⁶ does not run against the right of way granted to plaintiff. Under this proposition the authorities do not seem to agree very well. Among those supporting the contention of plaintiff, as fairly illustrating its position, may be mentioned: *Union Pacific Ry. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112; *Slocumb v. Chicago etc. Co.*, 57 Iowa, 675, 11 N. W. 641; *Railway Co. v. Telford*, 89 Tenn. 293, 14 S. W. 776; *Noll v. Dubuque etc. R. R. Co.*, 32 Iowa, 66; *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272. And it is insisted that the case of *Northern Counties Investment Trust v. Enyard*, 24 Wash. 366, 64 Pac. 516, determined by this court, is decisive in favor of plaintiff. It is true that the expressions in the latter case give much force and color to the argument. We think, upon further review and consideration of the question, that the court went too far in its acquiescence in the reasoning of some of the authorities before it at the time. In that case it was said, upon the facts found by the trial court: "The uses for the right of way in connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation, and fencing of a portion of the right of way not in use at the time would not seem to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the strip of land in controversy. Such occupancy and use by appellant may be regarded as permissive. ³⁵⁷ We think upon this ground alone appellant has failed to show sufficient title to maintain its action. Arriving at this conclusion, it is not necessary to discuss some other important objections argued by counsel for respondents."

But the facts in the case differ somewhat from those now under consideration. There the owners of the land granted four hundred feet of right of way to the Northern Pacific Railroad Company. The company thereafter located its line of road across the premises, and continued to operate the same.

Thus the entry in that case was by the consent of the grantor and it was observed: "It would seem, at any rate, to require some act upon the part of the owner of the servient estate which actually prevents the use of the right of way when required for the purposes of the railroad company, to give notice of adverse claim of right."

In the present case the attitude of the parties has been hostile from the inception of the right. But we do not think, upon principle, and what we now regard as the better authority, that the right of way of a railroad company is excepted from the running of the statute of limitations in this state. The same contention was made in the case of *Northern Pacific Ry. Co. v. Ely*, 25 Wash. 384, 87 Am. St. Rep. 766, 65 Pac. 555. It was there observed: "It is the contention of the appellant that the statute does not run against it, for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; and the appellant's predecessor ³⁵⁸ having been the true owner, and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, fifth edition, page 176: 'The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it

seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.' That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court: See *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055." See, also, *Illinois Central R. R. Co. v. O'Connor*, 154 Ill. 533, 39 N. E. 563; *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. W. 1111; *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700; *Coleman v. Flint etc. R. R. Co.*, 64 Mich. 160, 31 N. W. 47; *Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811; *Donahue v. Illinois Central R. R. Co.*, 165 Ill. 640, 46 N. E. 714; *Illinois Central R. R. Co. v. Houghton*, 126 Ill. 233, 9 Am. St. Rep. 581, 18 N. E. 301. The statute for the recovery ³⁵⁹ of real property or the possession thereof is section 4807 of Ballinger's Code, as follows: "The period prescribed in the preceding section for the commencement of actions shall be as follows: Within ten years—1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action."

Section 4807 of Ballinger's Code, is as follows: "The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed."

It may be clearly observed that under this statute there is no exception in favor of the state or public rights saving them from the application of the statute.

The judgment is reversed, with direction to the superior court to enter judgment in favor of appellants dismissing the action.

White, Fullerton, Hadley, Anders, Mount, and Dunbar, J.J., concur.

The Principal Case, while representing the opinion of a majority of the state courts upon the subject discussed (see the monographic note to *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 780-782), can no longer be regarded as controlling, where the question arises under a grant of a right of way for a railway made by the United States.

This was determined by the supreme court of the United States in *Northern Pac. Ry. Co. v. Townsend*, 23 Sup. Ct. Rep. 671, reversing the judgment of the supreme court of Minnesota in the same case, reported in 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007.

Mr. Justice White, after making a statement of the case, delivered the opinion of the national court as follows:

"At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

"Conceding the adverse possession and its efficacy under the state law as against the railroad right of way to be as found by the state court, the sole question which arises, then, for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a federal question.

"In determining whether an individual, for private purposes, may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in *Packer v. Bird*, 137 U. S. 661, 669, 11 Sup. Ct. Rep. 210, and approvingly referred to in *Shively v. Bowlby*, 152 U. S. 1, 44, 14 Sup. Ct. Rep. 548, 564, viz.: 'The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.' Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (*New Mexico v. United States Trust Co.*, 172 U. S. 171, 181, 19 Sup. Ct. Rep. 128; *St. Joseph etc. R. Co. v. Baldwin*, 103 U. S. 426), it must be held that the fee passed by the grant made in section 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case) 'to those necessarily implied, such as that the road shall be . . . used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On

the contrary, the grant was explicitly stated to be for a designated purpose—one which negatived the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect, the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof, upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 468, 'a railroad company . . . is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pac. R. Co. v. Smith*, 171 U. S. 261, 275, 18 Sup. Ct. Rep. 794, 799, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

'To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

'Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state.' Congress must have assumed when making this grant, for instance, that, in the natural order of events, as settlements were made along the line of the rail-

road, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.

“As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention supporting, on the one hand, or denying, on the other, the broad contention that title by adverse possession, under state statutes of limitation, may be acquired by individuals to land within the right of way of a railroad. None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case. As here, we find that the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress, the cases in question are inapposite.

“The judgment of the supreme court of Minnesota must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion. And it is so ordered.

“Mr. Justice Harlan and Mr. Justice Brown dissent.”

SROUFE v. MORAN BROS. COMPANY.

[28 Wash. 381, 68 Pac. 896.]

TEMPORARY VICE-PRINCIPAL—Who is.—If, in the prosecution of work, it is necessary to pass signals to the workmen, on the correct transmission of which their safety may depend, and the foreman selects one of their number to pass such signals, which he incorrectly does, he is performing a duty imposed on the principal, and must be regarded not as a fellow-servant of a workman injured by his negligence, but as a vice-principal for whose negligence the employer is answerable to the workman injured. (p. 858.)

MASTER AND SERVANT—Performance by Servant of Duties of Principal.—A fellow-servant, in performing the duties of the master, by his direction, becomes the agent of the master in the performance of those particular duties, and, for the time being, ceases to be in the common employment. (p. 858.)

MASTER—Liability to One Servant for the Negligence of Another.—A master is liable to one servant for injuries caused by

another if they result from the omission of some duty of the master which he has confided to the inferior employé and the duty of the master is personal and cannot be delegated. (p. 858.)

MASTER AND SERVANT—Dual Relations of Servants to One Another.—Parties working together as fellow-servants may be fellow-servants as to some part of the employment and principal or master with regard to some other part.' (p. 858.)

JURY TRIAL—Construing Instructions as a Whole.—If an instruction does not fully or correctly state the law, the losing party is not entitled to a reversal, or to a new trial, if it was given in connection with other instructions; and, construing the whole, there is no doubt that the jury was correctly and fully instructed. (p. 861.)

MASTER AND SERVANT—Care to be Exercised in Furnishing Appliances and Servants.—It is the duty of the master to furnish reasonably suitable and sufficient machinery, appliances, and servants, and this duty is discharged when he exercises ordinary and reasonable care in so doing. (p. 861.)

JURY TRIAL.—An Instruction Must Always be Construed in the light of the evidence in the particular case, and, if applicable to the evidence in that case, it will not be held erroneous, though conditions may be conceived where it would not be a correct statement of the law. (p. 861.)

MASTER AND SERVANT.—If the Negligence of a Fellow-servant is Combined with that of the Master, and this combined negligence causes injury to another servant, the master is liable. (pp. 861, 862.)

NEGLIGENCE—Circumstantial Evidence of.—Though the evidence does not show directly and positively that an accident resulting in personal injury and death was due to a rope with a knot on it, and to the fouling of this knot with certain appliances, yet if this result may be reasonably inferred, and if the use of the rope with such knot was, under the circumstances, negligent, the court is warranted in submitting the case to the jury, and the jury in returning a verdict affirming the negligence. (p. 863.)

Preston, Carr & Gilman, for the appellant.

Ballinger, Ronald & Battle, for the respondents.

382 WHITE, J. This is an appeal from a judgment rendered by the superior court of King county on the verdict of a jury in favor of the respondents and against the appellant **383** for the sum of six thousand five hundred dollars and costs. The action is by the minor children of one Henry C. Sroufe, deceased, to recover damages for the death of their father, occasioned by accidental injuries received while in the employ of the appellant as a ship carpenter. Omitting formal allegations, the material allegations of the complaint are, in substance, that while so employed as a ship carpenter the said Henry C. Sroufe was directed by the vice-principal of the defendant, the shipyard foreman, to go upon a high scaffolding which the defendant had erected on said yard, and surround-

ing a vessel in course of construction, and there assist in putting in place the cant timbers which the defendant was about to attempt to raise; that said cant frames or timbers were heavy wooden frames, or ship ribs, which were required to be adjusted to the keel of said vessel and a supporting harping near the top of said cant; that, to so adjust the cant, it was necessary first to hoist it, and then lower it gradually to a proper place of adjustment, and for the purpose of hoisting and lowering it in place, so that it could be adjusted and fastened, defendant provided an engine located near the stem of the vessel, and also blocks with tackle and rope running to a temporary derrick or gin pole situated near the cant, which was at the stern of the vessel, which rope was fastened to the cant, and also provided jackscrews, resting upon blocks laid on cross-timbers or spales for use underneath, or at the lower end of the cant; that it was the duty of Henry C. Sroufe, under directions to him from the yard foreman, to stand and remain upon the scaffolding aforesaid (it being about thirty feet in height) while the cant was being hoisted and lowered, to assist in the work, and keep the cant in place until it could be fastened; that in attempting to hoist and adjust the first cant, which was a very heavy ³⁸⁴ one, and to fasten same near the stern of the vessel, it had been hoisted into the air, and was hanging suspended by means of the ropes fastened as aforesaid, and on a jackscrew resting on planks laid across the spales beneath the lower end, and while the same was thus suspended and hanging and being lowered to its proper place, and while Henry C. Sroufe was on said scaffolding, and in the performance of his duties, and under the direction of the foreman aforesaid, and in the exercise of due and proper care, and without any negligence whatever on the part of said Henry C. Sroufe, the rope and said tackle slipped or gave way, and the spales and cross-planks and the jackscrews sprung or gave way, whereby and by reason thereof the heavy cant fell against the staging upon which Henry C. Sroufe was standing, with such rapidity and violence that it knocked the same down, and precipitated the deceased some thirty feet to the deck below, with such force that he was fatally injured, and from such injuries, and as a result thereof, shortly thereafter died; that the falling of the cant, and the consequent killing of the deceased, were on account of the negligence of the defendant and its foreman, in that the foreman failed and neglected to provide and furnish the deceased with a safe place

in which to work or to discharge his duties, and failed and neglected to provide suitable, proper, sufficient, adequate, or serviceable ropes, tackle, instrumentalities, and appliances, and to adjust or arrange the same in a suitable, proper, and safe manner, so that the same would work properly and safely, and failed and neglected to properly strengthen or to provide suitable spales, timbers, or staging underneath the jackscrews for the raising, catching, holding, or bearing of the weight necessary to rest upon the jackscrews in the process of lowering the cant, and said foreman employed by the defendant was negligent and careless in constructing, arranging, ~~and~~ managing, and operating the ropes, tackle, instrumentalities, and appliances as aforesaid, and the defective, unsuitable, and inadequate apparatus, and the negligent and careless management and operation thereof, and the manner of attaching and adjusting the same, as provided, furnished, and operated by the defendant and its foreman, rendered the same inadequate, unsuitable, unsafe, and dangerous, and rendered the place provided for deceased in which to work a dangerous and unsafe place to work, all of which facts were known to defendant and its foreman, and were unknown to deceased at the time of the accident or at all; that said accident occurred while the deceased was in the discharge of his duties under the direction of the foreman of said defendant, and while the deceased was in the exercise of due and proper care, and without negligence or notice of any of the things heretofore mentioned, and was owing wholly and solely to the failure and negligence of the defendant and its foreman as above alleged.

The following are the facts surrounding the accident:

Among other branches of industry, the appellant conducts a shipyard, in which wooden ships are built. On the 29th of May, 1900, appellant had on its ways, in process of construction, the barkentine "Minnie E. Caine." Appellant's shipyard and the construction of the ship were in charge of a shipyard foreman, one George R. E. Monk, who had full direction and control of the men working upon this vessel. It was on this day, and while working on this vessel, that Henry C. Sroufe received the injuries from which he died. At the time of the accident the shipyard crew was composed of said Monk, some ten or twelve ship carpenters, and two winchmen, the latter having charge of the donkey-engine or winch used in hoisting. The crew at this time were engaged in putting a cant in place in the after framework of the vessel. The

keel, in framing, was on blocks ³⁸⁶ built up over four feet high. Fastened to the ribs or frames of the ship during her construction, and running lengthwise from stem to stern, were large timbers called "ribbons." There were a number of parallel ribbons, one above the other, with intervals of only a few feet between them; the lowest ribbon being under the bilge of the ship, and the highest ribbon at the top of the ribs or frames. Standing on end and underneath the body of the ship were many upright timbers, called "shores" or "standards." The ship was being constructed on a planked wharf. The lower end of these shores rested on the wharf, the upper ends being fastened under and against the lower surface of these ribbons. The purpose of these shores was to hold the ship up and in place during construction, and they were firm and solid under the weight of the vessel. There were two rows of these shores all around the ship, and in some places three rows, the row set under the ribbon fastened under the bilge being called "bilge shores," in distinction from the rows of shores set under other ribbons. These rows of shores were not straight, but, like the ribbons under which they were set, conformed to the curvature of the ship. The keel of the ship was one hundred and eighty feet in length. These shores were six or seven feet apart. The shores under one ribbon were not set opposite the shores under another ribbon, but were, like brickwork, set between or apparently alternating. Looking from forward toward aft, or vice versa, these shores presented the aspect of an irregular forest of uprights: the arrangement in this ship actually making a shore standing in every two feet of distance. Owing to the height of the vessel above the wharf, a sort of a platform had previously been constructed under the sides of the vessel, and underneath the frames on which the workmen stood to drive bolts upward. This platform had consisted of one or more loose planks laid on cross-timbers called "spales," ³⁸⁷ extending at right angles to the keel. These spales or cross-timbers were of different dimensions—from five by five to six by six. They were from eight to ten feet apart, there being from eighteen to twenty of them on the port side of the vessel. They were resting on blocks one foot high set on the wharf. These cross-spales were about twenty-five feet long, and extended from the keel out beyond the outer row of shores. Some of them rested against the shores at one end, and some against the keel blocks at the other. All of the ribs in the ship known as the "square frames" had

been raised and fastened onto the keel. The frames or ribs aft of these square frames, and which were to be fastened to the deadwood, are called "cants." The cants are heavy sticks of timber, bowing in shape, and forming, with the square frames in front, the framework upon which the outside planking of the vessel is laid. The cant being raised at the time of the accident weighed over a ton. In this vessel there were eight or ten of these aft cants to be raised and attached on each side. These cants were each composed of a number of sticks, and were framed together, and the cants fashioned on the place on each side of the stern where they were to be raised. The lower end of the cant or the heel was to be set or adjusted to a particular line on the deadwood, and there fastened by bolts to be run through holes bored in the cant and through the deadwood. These holes were bored before raising. A large timber called a "harping," which is a continuance of the ribbons, ten inches wide, and on a plane with and near the top of the cants when raised, was fastened and extended from the square frames to the stern post of the vessel. The tops of the cants, when raised and set in place, would rest against this harping. To fasten or adjust the cant in place, it was necessary to raise the cant and fasten it to its proper place on the deadwood. The following method was used to put ³⁸⁸ the cant in place and fasten it: Two chains were attached to the cant, one near the heel or lower end, and the other at some distance from the top. These chains were then connected with a connecting chain called the "bridle chain." To this bridle chain a rope or hoisting line was attached. This hoisting line was then attached to a tackle consisting of two pulleys, with two sheaves each, the fall of which ran through a sheave or pulley near the top of a derrick erected on top of the deadwood, and immediately over the place where the cants were to be fastened. Thence the fall ran down to and through a sheave in a snatch block fastened to the deck of the wharf, almost immediately under the derrick or under the keel, from which the rope was conveyed to a forward snatch block fastened forward of the bow of the ship, and underneath a raised wharf or platform, and thence through the sheave in this forward snatch block up through this raised wharf to the winch or donkey-engine set upon this raised platform. After the cant was raised as near to its right place as was practicable with tackle, it was caught by shoving a jackscrew under a set bolt previously fastened for the purpose in the face of the heel of the

cant. The man handling the jackscrew, with other men assisting in adjusting the lower end of the cant, and ready to fasten in place, had to take position and work immediately under, and nearly up to the level of, the point where the heel was to be fastened. Owing to the height of the ship above the wharf, this required the erection of a platform of sufficient strength to hold the men and the weight of the cant. The jackscrew rests on this platform, its lower end out somewhat from perpendicular, its top inclined toward the deadwood. To give its purpose substantially as set forth in the evidence: "The purpose of the jackscrew is to take a cant and hold it against the deadwood, and also to lower the cant to place ³⁸⁹ when the tackle stops it above; and when the tackle lets it fall below the place, as is frequently the case, the jackscrew raises it to its place. The whole weight at times rests on this jackscrew. Sometimes it has to be raised five inches. In addition to the purpose of raising and lowering the cant, the jackscrew also presses against the deadwood." This platform was a necessary appliance for raising and holding these cants, and it was not possible to raise them without this platform and jackscrew. This platform consisted of plank three inches in thickness fastened onto cross-spales. One end of these spales rested on a cleat six by six, securely spiked to the keel; and to prevent its shoving or working away from the keel, and to hold it solid under the outward shove or pressure of the weight on the jackscrew standing at an angle as above mentioned, this platform, prior to the commencement to raise, had one of its spales or cross-timbers on which it rested ten or twelve feet in length, and extending out to, and securely spiked to, one of the shores. The shore was solid underneath the weight of the ship, and by its construction the platform was sufficiently strong. The winch was in advance of the stem of the ship, and was fully two hundred feet forward of the point where the cant was to be fastened, and about twenty-five feet to the left of the port bow. The rope was not long enough to reach the winch.

The evidence is conflicting as to whether the use of but a single rope was sufficient, under the circumstances, in this instance. Monk, the vice-principal of the defendant, testified that they did not have a rope long enough in the yard; that they could have had one long enough, but would have had to send uptown for it. Monk superintended the rigging of the tackle. Matthewson and Borofski, two of the workmen on the ship, did the work under his supervision. Matthewson asked Monk

if he should splice the rope. ³⁹⁰ Monk was ready to go ahead with the work, and said, "No, tie it." Two ropes, each an inch and a half in diameter, were tied together with a large knot, the knot being about twenty feet forward of the aft snatch block. The evidence is conflicting as to whether this rope ran along the deck of the wharf, or over the top of the cross-spales. It ran either over or under the cross-spales, diagonally and between, among and through the shores to the forward snatch block; thence through a sheave under the platform on which the donkey-engine stood, and up to the winch, being practically underneath the keel at the aft snatch block, and about twenty-five feet therefrom at the forward snatch block. The top of the spales was from seventeen to eighteen inches above the deck of the wharf. Matthewson and Borofski, who rigged the tackle under Monk's supervision, say the aft snatch block was rigged so the rope would clear the top of the spales, but the forward snatch block was a little lower than the top of the spale. Monk himself admits that the forward snatch block was about twelve inches high. Monk and others testified that the rope passed under the spales. Geared as this rope was, this knot, in raising the cant and lowering it to place, would move forward from seventy to one hundred feet, and thence backward part of the way. The pull on the rope where the knot was was less than one-fourth of the weight, and it would be still less after the jackscrew caught the cant. The moment the rope commences to slack, it drops or bends downward more or less. The rope had more or less elasticity. The testimony is clear that, if the rope went over the top of the spales, the knot was liable to catch or foul. The wharf underneath the spales was uneven, and some of the planks were sticking up above others, and there was liability of the knot fouling even under the spales. There was evidence tending to show that the foreman inspected the rope. ³⁹¹ through a workman, to ascertain if it was likely to foul. There was testimony tending to show that if the rope had been one continuous piece, or had been spliced together instead of being tied, it would not have been liable to foul. When they went to raise the first cant, the lower end of the cant slipped under the stage built for the purpose of adjusting the heel of the cant, and under the cross-spale, which pressed out to the shore before spoken of. We can better illustrate this part of the statement with the evidence of Joe Landeen, a ship-builder, whose duty it was to handle the jackscrew. He says, in substance: "They had had trouble from the very start. The

heel of the cant always caught under the spale. They put a line on it, and tried to pull it back several times, but it would not work. It would always come back under. After repeating this for half an hour, Monk said, 'Saw off that spale right here'; referring to the spale upon which the small stage was built, and which ran out to, and was spiked to, the shore. After this was sawed, Monk said, 'Now, go and get a shore and set it under there.' Some one got a shore and set it under."

This was a short block set on end under the spale, and the platform rested on the small block set on end, not fastened to the wharf or braced. Some of the evidence tended to show that it was the duty of the workmen to build their own platforms. But to continue Landeen's narrative: "Monk then said, 'Now, Joe, you go up and handle that jackscREW.' Joe replied, 'That stage won't be safe now. That will fall down. It ought to be fastened.' Monk said, 'No, that's all right, all right; go ahead; go ahead.'"

The reason that the stage was not strengthened was because Monk would not give them time. They were from an hour to an hour and a half in raising and lowering the first cant. The testimony tended to show that it should have been done in half an hour, if properly done. Monk himself ³⁹² testified that he had had considerable trouble with the cant, and things did not go right; that something was wrong, and they raised and lowered it a number of times. It was while hoisting this cant and lowering it to place that the accident occurred. For some reason (the reason is the matter of dispute) the men at the winch let go (that is, allowed all the rope to run off the winch); and the cant, being thus released, fell, breaking down the staging upon which the jackscREW was placed to force the heel of the cant into position, also striking and breaking down the staging upon which the deceased was working, and causing him to be thrown to the deck of the wharf. The winchmen are guided in the operation of the winch by signals, well understood by men in the business, given to them by the foreman, either directly or through some intermediary. In raising the cants or frames, the foreman is compelled by the nature of his work to stand in close proximity to that part of the vessel where the cant or frame is being put in place; and, in raising the after frames or cants of the vessel, the position of the foreman in this instance was so far away from the winch, and his view was so obstructed by other frames in the vessel, that the winchmen could not see him clearly, so that in raising these after cants or frames a man was stationed

by the foreman in such a position that he could see the foreman, and the winchmen clearly see him, for the purpose of transmitting the signals given by the foreman for the guidance of the winchmen. The cant in question was to be placed in the after part of the vessel, and the foreman stood two or three hundred feet from the winchmen. He selected from the ship carpenters there employed a man, and put him in a station as a signal passer. The man selected was by the name of Redman—a ship carpenter in the same employment as the deceased, who had worked under Monk for several years, had frequently ³⁹³ acted as signal passer, and understood the signals. The reason for the accident is a matter of some doubt, but we think from the evidence that the jury was warranted in believing that the knot in that portion of the rope that led from the aft tackle to the winch caught in a cross-spale or shore or on the wharf, thereby holding the cant stationary; that for that reason slack accumulated at the winch, so that when the rope was let loose from the drum of the winch the knot was suddenly released, letting the cant fall abruptly. There is no direct evidence that the knot caught in the manner indicated. There is evidence showing that the foreman gave the signal “All gone,” or “Let go,” and that it was in response to this signal that the winchmen allowed the rope to run off the drum. There is contradictory testimony, however, as to this. There is considerable evidence to the effect that Monk gave to Redman the signal “Lower away,” or “Lower away slowly”; that Redman, in transmitting this signal to the winchmen, instead of giving the signal “Lower away,” gave the signal to “Let go,” and the winchmen, acting on this signal, did let go, thus allowing the cant to drop. Monk, in signaling to the intermediary, was governed by directions from the man at the jackscrew. The verdict of the jury was general, and it is impossible to tell which theory it adopted.

The court charged the jury as follows: “I charge you further that the servant does not assume the risks of carelessness of those who undertake to discharge, under the master’s directions, the master’s duty toward the servant, even if such persons are also servants of the same master; nor does the servant assume risks which he neither knows nor suspects, nor had reason to look for. The risks incident to his employment which he assumes are such risks as he knows, or which by the exercise of ordinary care he should have known of. In this connection, I charge you that while in the discharge of his ordinary duties the ³⁹⁴ man Redman was a fellow-servant of the deceased, yet

while engaged in transmitting signals from the foreman, Monk, to the men operating the donkey-engine, he was discharging a duty imposed by law upon the vice-principal, and was therefore, while so engaged, a vice principal of the defendant; and if you find from a preponderance of the evidence that Redman failed to correctly transmit the signal given him by the foreman, Monk, and by reason of such failure the injury, if any, complained of, was caused, then you must find the defendant was guilty of negligence."

The appellant assigns this instruction as error. The court also refused to give to the jury the following instruction requested by the appellant: "I charge you that in the case at bar the person stationed to transmit the signals from the foreman to the men at the winch was in the same common employment with the deceased, and was a fellow-servant of the deceased, and that the defendant is not liable in this action if you shall find from the evidence that the accident to Sroufe was occasioned by the negligence of such person."

This, also, is assigned as error. The court also refused to give at the request of the appellant the following instruction: "I charge you that Redman, in his capacity as transmitter of signals from the foreman to the winchmen at or shortly prior to the happening of the injury to Sroufe, was a fellow servant of Sroufe, and the defendant is not responsible for any injury which occurred to Sroufe, directly caused by the negligence of said Redman."

The refusal of the court to give this instruction is also assigned as error. These three assignments of error may be discussed under a single head, as they all involve the same question, viz., the relation of the signal passer, Redman, to appellant and the deceased. The position of the respondents is that Redman, in the performance of the work in which he was engaged at the time of the accident, was a ³⁹⁵ vice-principal, while appellant contends that he was a fellow-servant of Sroufe. The lower court, in giving the instruction complained of, and in refusing to give the other two instructions requested by the appellant, adopted respondents' theory, and the case was sent to the jury with the instruction that Redman's negligence was the negligence of the defendant. There was evidence tending to show that it was Monk's fault that caused the accident. There was evidence tending to show that Redman did not transmit to the men in charge of the winch the correct signal given to him by Monk; that he transmitted the signal to "Let go," or "All

gone," when the signal was to lower. If Redman was the fellow-servant of Sroufe in giving the signals, the instruction of the court was erroneous; for, in effect, it said to the jury that, if either Monk or Redman was at fault, the defendant was liable. The only fault attributed to Redman was in transmitting the signal given to him by Monk. If in transmitting this signal Redman was not the fellow-servant of Sroufe, but the agent of Monk, then the instruction was correct. But if Redman was at fault in transmitting the signal, and at the time and in so doing he was the fellow-servant of Sroufe, the injury resulted from the acts of a fellow-servant, and the appellant would therefore be discharged from liability. Was Redman the fellow-servant of Sroufe in transmitting the signals? is the question we are called upon to decide. We think he was not the fellow-servant of Sroufe in performing the duty assigned to him by Monk in transmitting Monk's signals. It was the duty of Monk to direct the men in charge of the winch. In using an intermediary for that purpose, the intermediary was not serving in the line of his common employment as a ship carpenter, but was the voice or arm of the principal. An agent does not act as an agent when doing some act entirely outside of his agency. So a fellow-servant, ³⁹⁶ in performing the duties of the master by the direction of the master, becomes the agent of the master in the discharge of that particular duty, and for the time being ceases to be in the common employment. The master is liable for injuries caused by another servant, if they result in the omission of some duty of the master which he had confided to such inferior employé; and the duty of the master is personal, and cannot be delegated: *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398. Here it was clearly the duty of the foreman to give the signals to the operatives of the winch who controlled the raising and lowering of the cant. When he saw fit to confide that duty to some one else in connection with himself, the intermediary, in performing that duty, was a foreman, because he was the foreman's mouthpiece or voice. Persons working together as fellow-servants may be fellow-servants with regard to some part of the employment, and principal or master with regard to some particular part of the employment: *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 130, 64 Pac. 169; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398.

The appellant strenuously insists that the position of Redman was similar to that of a telegraph operator charged with

the duty of transmitting the orders of the train-dispatcher to the train operators. It has been held that a telegraph operator in the employment of a railroad company, charged with the duty of receiving messages from the train dispatcher and conveying them to the trainmen, is a fellow-servant of the trainmen: Oregon Short Line etc. Ry. Co. v. Frost, 21 C. C. A. 186, 74 Fed. 965; Baltimore etc. R. R. Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952; McKaig v. Northern Pacific R. R. Co., 42 Fed. 288; Cincinnati etc. R. R. Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125; Illinois Central R. R. Co. v. Bentz, 40 C. C. A. ³⁹⁷ 56, 99 Fed. 657; Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627. It is unnecessary to determine at this time whether such ruling is correct or not. We do not think that the position of Redman is analogous to the position of the telegraph operator in transmitting the orders of a train-dispatcher to the trainmen. There is nothing in this case that shows that it was not just as convenient to place the donkey-engine and winch in a position where the men in charge could have governed their action by the direct signals of the foreman, as to place them where they were placed. Train dispatchers must, of necessity, transmit their orders by telegraphic messages. There is a clear distinction between the situation of a local telegraph operator in his relation with the trainmen, and Redman in his relation with Sroufe. The citations hold that the train-dispatcher is a vice-principal, and that his negligence is binding on the master. The citations are all upon the negligence of the local operator at a distance, and away from the personal sight and touch of the dispatcher, and where it is impossible, from the nature of the business, for the dispatcher to exercise personal supervision, but are a practical affirmance of the proposition that if the negligence was of the operator in the office of the dispatcher, or under his personal supervision, then such negligence is the negligence of the dispatcher. The citations are particular in laying stress upon the servant as the local operator at a distance from the dispatcher. The reason for the distinction is obvious. The rule has existence in the fact that conductors, engineers, and brakemen, when they are in the employment of the railroad company, take notice that orders must come through the local telegraph operator at the station, and that they incur the risk of accidents through his negligence or mistake. The special orders in the first instance are transmitted by the train-dispatcher. It is obviously impossible for him to give personal ³⁹⁸ notice to all who are to be governed thereby, and the orders must of

necessity be conveyed to some one in behalf of the others. Hence it is held by these citations that the local telegraph operator is a fellow-servant of those who are in control and management of the train. Even on this proposition there are many conflicting authorities. This rule would have no force if the train-dispatcher were present and gave the order direct to the local telegraph operator in person, or could have placed himself in a situation to give it in person.

The court instructed the jury as follows: "I further instruct you, gentlemen, that, in the raising of the cant in question, whatever was necessary or needful or useful in order to raise the cant in an ordinarily safe manner, and consistent with the care and caution necessary to render safe and free from danger the workmen engaged in it, are instrumentalities or appliances, within the meaning of the law, whether the same be ropes, engines, platforms or staging, or servants; and it is the duty of the master, or its vice-principal or yard foreman having charge of the raising of this cant, to furnish all such necessary instrumentalities and appliances, whether ropes, machinery, staging, or servants, and that they shall be reasonably suitable and competent."

This is assigned as error. The appellant claims that this instruction makes the master the insurer or guarantor of the servant's carefulness at all times, no matter how careful the master has been in the selection of his employés. It claims that the error in the instruction is twofold: 1. There was no claim in the pleadings that Sroufe had been required to work with an incompetent fellow-servant, and this instruction is therefore outside the issues, and must have tended to confuse and mislead the jury; and 2. That it does not correctly state the law, as the master is not bound at all hazards to furnish his servants with competent ³⁹⁹ fellow-servants; he is only bound to use reasonable care in the selection of servants, and reasonable care in the retention of them. If the instruction stood alone, there would be ground for the criticism. But the court also told the jury, in other portions of his instructions, that "the care required by the master in selecting competent employés is commensurate with the care required in selecting adequate machinery"; and the court, in instructing as to the care required in selecting machinery, in effect told the jury that it was the duty of the master to use reasonable care to provide his employés with suitable instrumentalities and appliances, and to keep them in reasonably safe condition, and to provide his employés with a reasonably

safe place in which to work. Taking all the instructions together, the court told the jury that it was the duty of the master to provide all necessary appliances, including servants, and that they were to be reasonably suitable and competent; and he, in effect, told the jury that the master had discharged his duty in this respect when he had exercised reasonable care to provide such. We think that this is a correct statement of the law. The instructions, taken as a whole, show that the court told the jury it was the duty of the master to furnish reasonably suitable and safe machinery, appliances, and servants, and that the defendant discharged this duty when it had exercised ordinary and reasonable care in so doing.

As to the contention of the appellant that this was beyond the pleadings, the pleadings alleged carelessness and negligence in the vice-principal in the arranging of his appliances; and if the vice-principal was thus incompetent, from which the jury might infer that he was, and if Redman was in the discharge of the duty by the master to the servant, his incompetency was likewise within the pleadings. But we think that the use of the word "servant" in the instruction ⁴⁰⁰ did not mislead the jury, and it was not contrary to law, and was applicable under the facts in this case. "An instruction must always be construed in the light of the evidence in the particular case in which it is given, and, if applicable to the evidence of that case, it will not be held erroneous, even though conditions may be conceived where it would not be a correct statement of the law": *Allend v. Spokane etc. Ry. Co.*, 21 Wash. 324, 58 Pac. 244.

The court instructed as follows: "Mere negligence on the part of the deceased, or of the fellow-workmen or colaborers, will not be sufficient to prevent recovery by plaintiff for injury caused by the negligence of the defendant. You must find from the preponderance of the testimony that the negligence of the deceased or his fellow-servant, if any, was not remote, but was the proximate cause, or proximately contributed to the death of the deceased. Where the negligence of a fellow-servant is combined with the negligence of the master, and this combined negligence causes an injury, the company is liable."

This is assigned as error. The error contended for is in the following language: "Mere negligence on the part of the deceased . . . is not sufficient to prevent recovery . . . for injury caused by the negligence of the defendant." The appellant contends that this is an instruction as to comparative negligence, and, as the doctrine of comparative negligence does not

obtain in this state, that it is erroneous. We have read with care every word of testimony in this case. There is not a particle of evidence of negligence on the part of the deceased. There is no evidence from which the jury could infer such negligence. Hence mere reference to negligence on the part of the deceased in the instruction, if error, was harmless. The instruction is simply to the effect that where the negligence of a fellow-servant is combined with the negligence of the ⁴⁰¹ master, and this combined negligence causes an injury, the master is liable. This is a correct statement of the law: *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 630, 55 Am. Rep. 508; *Ellis v. New York etc. R. R. Co.*, 95 N. Y. 546.

At the close of the respondent's testimony the appellant challenged the sufficiency of the evidence, and moved the court to take the case from the jury and direct a verdict for the defendant. This motion was denied. The motion was renewed at the close of the entire testimony and denied. The refusal of the court to grant these motions is assigned as error. The evidence at the close of the respondent's testimony tended to show that the knot in the rope fouled the rope; that the rope ran over the top of the spales; that it was negligence to use the rope with the knot in it in that way; that, when the cant would not come down to its place, the foreman, Monk, took hold of the fall and threw his weight upon it to pull it down; that this released the knot, causing the cant to fall and knock down the staging on which Sroufe stood. Matthewson, engineer at the donkey-engine, testified, in substance, that, after the cant had been hoisted, they had been lowering according to signal gradually for two minutes or so, during which time the rope responded and paid out. Then it ceased to pay out. The signal for slack continued for two or three minutes longer, during all of which time the slack was being paid out in obedience to the signal, and being piled upon the wharf underneath the platform. At least fifteen or twenty signals for slack were given while it was thus being paid out and piled up. Finally Redman gave the signal "All gone," or "Let go," and immediately went aft. At this time many feet of the rope were piled upon the wharf. Two or three minutes after Redman went aft, the cant fell. The evidence ⁴⁰² tends to show that Redman's last signal was, "All gone." Monk then took hold of the rope and pulled, and at the same time told the deceased, who was upon the upper staging, to take a bar and pinch away from the harping the top of the cant.

Sroufe looked up at the block. Monk halloed. "Never mind the rope," and commenced pulling on it towards him to get some slack. The cant commenced to slide, and all at once "away she went." Monk stated to Sroufe, the brother of the deceased, shortly after the accident, that they had considerable trouble with the cant, and things did not go right; that he had been calling for slack, and could not get it; that the cant hung quite a little while, but would not come down; and that he thought he might get a little slack by pulling on—surging on—the rope, and he took hold of it, and as he surged on the rope it went with a rush. Monk further stated to this witness that there was a knot in the rope, and the knot might have fouled or caught something. It is true that the testimony fails to show directly and positively that the fouling of the knot caused the accident. From the evidence, however, this may reasonably be inferred. As was said by us in the case of *Abrams v. Montana etc. Ry. Co.*, 27 Wash. 507, 68 Pac. 78, where there was no direct proof that the fire that caused the injury complained of escaped from the passing engine: "The respondent was not obligated to prove these facts by the direct evidence of an eye-witness, nor by proofs which would leave them beyond the possibility of a doubt. It was sufficient if he established them by the proof of circumstances which lead reasonably to their inference, and which ordinarily satisfies an unprejudiced mind of their truth."

This language, we think, can be applied to the facts in this case; and the jury would be warranted in believing ⁴⁰³ from the evidence that the rope fouled, and held the cant in place, and that it would not have fouled but for the knot in it, and that by reason of the slack being out, and the weight of Monk thrown upon the rope, the knot was suddenly loosened, thereby causing the cant to fall, knocking down the platform upon which the deceased was at work, and thereby causing his death. We do not think, therefore, that the court erred in denying a motion for nonsuit. The testimony of the appellant tended to show that the rope ran under the spales; that, if it ran over the top of the spales, it was liable to foul. The testimony also tended to show that, if the rope ran under the spales, it might have fouled on the wharf, or on one of the shores. The use of the rope with the knot in it, under the circumstances of this case, as a matter of negligence, was for the jury. We do not think, therefore, that the court erred in denying these motions.

The judgment of the court below is affirmed, with costs to the respondents.

Reavis, C. J., and Hadley, Mount, Fullerton, Anders, and Dunbar, JJ., concur.

Fellow-servants and Vice-principals.—Whether one servant is a fellow-servant of another does not depend upon their respective grades or rank, but upon the nature of the services being performed: *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 Am. St. Rep. 885, 87 N. W. 461; *Morgridge v. Provident Tel. Co.*, 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328. An employé may be a fellow-servant when performing certain duties, and when performing other duties he may represent his employer: *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 87 Am. St. Rep. 547, 61 N. E. 143. And if an injury is caused to a servant by another employé through an act pertaining to the duty which the master owes to his servant, the master is answerable: *Mast v. Kern*, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 950; *Chicago etc. R. R. Co. v. Eaton*, 194 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784; *Hayes v. Colchester Mills*, 69 Vt. 1, 60 Am. St. Rep. 915, 37 Atl. 369. As to who is a vice-principal for whose negligence the employer is liable, see the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584-640. And as to who is a fellow-servant, see the monographic note to *Fox v. Sanford*, 67 Am. Dec. 588-597. A master is liable to his servant for an injury caused by the combined negligence of the master and a fellow-servant: *Chicago etc. Ry. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117, and cases cited in the cross-reference note thereto.

ABB V. NORTHERN PACIFIC RAILWAY COMPANY.

[28 Wash. 428, 68 Pac. 954.]

JOINT TORT-FEASORS are Equally Liable for the Whole Injury Done, and the injured person may pursue one separately, or all jointly, or any number jointly less than the whole, but there can be but one satisfaction. (p. 866.)

THE RELEASE of One Joint Tort-feasor granted on a payment made by him necessarily releases all, though it stipulates to the contrary. (p. 872.)

B. S. Grosseup and James F. McElroy, for the appellant.

Hastings & Stedman, for the respondent.

428 HADLEY, J. This is an action to recover for personal injuries received by respondent in a collision which occurred in the city of Seattle between an outgoing passenger train of appellant and a street-car of the Grant Street Electric Railway Company at a crossing of the two railways. **429** Respondent was a passenger upon the street-car, and alleges that his injuries

were occasioned by the joint carelessness of the persons operating the street-car and those operating the railway train. The action was brought against the appellant only. A trial was had before a jury, resulting in a verdict for respondent in the sum of one thousand dollars. A motion for new trial interposed by appellant was denied, and judgment entered against appellant for one thousand dollars and costs. From said judgment this appeal was taken.

The answer affirmatively alleged that after the collision aforesaid occurred, for and in consideration of the sum of three hundred dollars, then paid to him by the said Grant Street Electric Railway Company, and a pass delivered to him over its street railway for the period of one year, the respondent did then and there agree with the said street railway company to release, and did fully, finally, and forever release and discharge, the said street railway company and the appellant from any and all damage and claim of damage done to his person or property, and from any and all claims whatsoever growing out of said collision; which said agreement was in words and figures as follows, to wit: "For and in consideration of the sum of three hundred dollars (\$300) in hand paid, and a pass over the Grant Street Electric Railway for the period of one year, I, the undersigned, do hereby release and discharge the Grant Street Electric Railway Company from any and all damages done to me in my person or property in the late collision between a car of the Grant Street Electric Railway Company and a train of the Northern Pacific Railroad Company. This agreement is not to be taken or considered as a release of any damages which the undersigned may have against the Northern Pacific Railroad Company."

It is further alleged that by reason of said agreement the appellant is fully released and discharged from all liability ⁴³⁰ in the premises, and that respondent is estopped from maintaining this action. The reply admits the receipt by respondent of three hundred dollars and a pass for one year from the street railway company, and also admits that respondent executed the release set out in the answer and delivered the same to said street railway company; alleges that said payment and said pass were given to respondent in partial satisfaction, only, of his damages suffered in said collision, as was understood by said street railway company and respondent at the time; and that it was not the intention on the part of either respondent or said street railway company to in any manner

release or discharge respondent's cause of action or to surrender any claim for damages that he might have against appellant. Under the issue made by the pleadings concerning said payment and release, we are called upon to determine the effect thereof upon the status of appellant in this action. The trial court construed the written release in its legal effect to be a mere covenant on the part of respondent not to sue the street railway company in consideration of the payment of three hundred dollars and the issuance to him of a pass for one year, and instructed the jury that it was not a full bar to the action against appellant, but that they should deduct the amount so paid from what they should find the whole damage to be, if they found such whole damage to be greater than the amount paid, and should return a verdict for the balance. It is evident from the pleadings that but one wrong was committed, and that was the joint wrong of the street railway company and the appellant. The two companies jointly committed the tort from which the injuries arose, and there can be no question but that said release and payment fully released and discharged the street railway company, one of the joint wrongdoers, from responding to any further demand for damages. In whatever light ⁴³¹ the release be viewed, whether as a mere covenant not to sue the street railway company, or as an absolute discharge thereof, there can be no doubt that it could be pleaded in full bar of any action against the street railway company for further damages. It is, and has long been, a generally recognized rule that there is no line of separation between the liability of joint tort-feasors. The tort is a thing integral and indivisible, and any claim for injuries arising therefrom runs through and embraces every part of the tort. The liability of one cannot be carried into any portion of the joint tort that is not followed by an equal liability of the other tort-feasors. Each is liable for the whole, and the injured party may pursue one separately, or he may pursue all jointly, or any number jointly less than the whole number. This principle is discussed in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, and *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406. But while they may be thus pursued separately or jointly, yet there can be but one satisfaction.

"In a joint trespass or tort each is considered as sanctioning the acts of all the others, thereby making them his own. Each is therefore liable for the whole damage, as occasioned by himself, and it may be recovered by a suit against him alone.

There can be no separate estimate of the injury committed by each, and a recovery accordingly. The difficulty in maintaining the suit against the others is that the law considers that the one who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received": *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370, 371.

In *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, one who was injured by a collision between two cars of ⁴³² different companies accepted a certain sum in full of all claim for the injuries against one of the companies, and executed a release in which he agreed to prosecute the other company, and reimburse the first out of the amount recovered. The release was held to be a bar to an action for the same injuries against the other company. The opinion says: "The court below held very properly that this agreement and release was a bar to a recovery in this action. The plaintiff had received one satisfaction; he was not entitled to a second."

In *Turner v. Hitchcock*, 20 Iowa, 310, 317, 318, Mr. Justice Dillon, in a well-considered opinion, says upon this subject: "It is also an undisputed principle of the common law that as a general rule, the release of one joint wrongdoer releases all. The rule and the reason for it are thus stated in a work of high authority: 'If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet if he releases to one of them, all are discharged, because his own deed shall be taken most strongly against himself.' Also (which seems to be the better reason) such release is a satisfaction in law which is equal to a satisfaction in fact: Bacon's Abridgment, tit. 'Release,' B. . . . 'The reason of the rule' that the release of one is the release of all 'seems,' says Bronson, J., with his accustomed clearness and force (*Bronson v. Fitzhugh*, 1 Hill, 185), 'to be that the release being taken most strongly against the releasor is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tortfeasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.'

In *Denver etc. R. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501, it was held that, where two railroad companies ⁴³³ were jointly liable for injury to a person, a release by such person of his right of action against one of the companies also released the other. The following cases are also directly to the same point, and strongly support the same rule: *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Goss v. Ellison*, 136 Mass. 503; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135.

It is urged that the release in the case at bar amounts to no more than an acknowledgment of partial satisfaction of the entire demand, and that this is made clear by the reservation of a right to make further demand of appellant, which appears at the conclusion of the written instrument set out above; in other words, it is insisted that the parties to that agreement did not intend it to be a release of appellant. As we have seen, however, they did intend it to be a release of appellant's joint tort-feasor. Respondent's counsel frankly concede that there is conflict of authority upon this subject, but insist that the construction placed upon the release in question by the superior court is the reasonable one in order to give effect to the intention of the parties. The following cases, however, not only support those already cited, but further hold that in an action to recover for a joint tort, if the plaintiff shall receive money in satisfaction of the wrong done him by one party, it is a satisfaction as to all, and they are thereby discharged of all liability to plaintiff, whether the parties to the release agreement intended it to so operate or not: See *Brown v. Kencheloe*, 3 Cold. 192; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Mitchell v. Allen*, 25 Hun, 543; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. In the cases last cited there were reservations to the effect that, notwithstanding the release of one, others who were jointly liable should not be thereby released; but in each instance it was ⁴³⁴ held that the release of one operated in law to release all. Referring to a release with such a reservation, the opinion in *Ellis v. Bitzer*, 2 Ohio, 93, 15 Am. Dec. 534, makes the following observation: "It can make no difference that it was part of the agreement between the plaintiff's agent and Williams and Adkins that the giving and receiving the note mentioned in the pleas was not to be a satisfaction for the other trespassers. Each joint trespasser being liable to the extent of the injury done by all, it follows

as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned. Williams and Adkins could make no agreement impairing the legal rights of the defendants, nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to this action. The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge."

In *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504, the release was under seal, and it was held that the proviso in the release by which the right to recover for the same injury against others was attempted to be preserved was void, as being repugnant to the legal effect and operation of the release itself. It is generally held that a release under seal given to one shall have the effect to discharge all, whether the release shows upon its face a payment in satisfaction or not, the reason for the rule being that the solemnity of the seal imports a consideration and satisfaction. The release in the case at bar, however, shows upon its face a payment and satisfaction. Moreover, by statute in this state, the use of private seals is abolished, and it is provided that "the addition of a private seal to any such instrument or contract in ⁴³⁵ writing hereafter made shall not affect its validity or legality in any respect": Ballinger's Code, sec. 4523.

We will now refer to cases cited by respondent. In *Chamberlin v. Murphy*, 41 Vt. 110, a release was pleaded which had been given one of the joint tort-feasors pending an action for the tort. The release acknowledged payment of sixty-five dollars "in settlement so far as said Simonds' estate is concerned, only, of a suit in favor of Mary E. Gray and her husband against said Simonds, and not in settlement of the cause of action for which said suit was brought; and she reserves the right to prosecute any other parties to said trespass, and this settlement is not to affect the same. The suit now pending against said Simonds is to be entered discontinued without costs to either party." It will be observed that the writing expressly stated that it was in settlement of that suit, but not of the cause of action for which the suit was brought. The consideration was that the particular suit then pending was to

be simply discontinued as to the one party, but the right to pursue the cause of action was expressly retained. The court held the legal effect of the instrument to be not a release of the cause of action, but simply a covenant not to sue the one party, and that it was, therefore, not a discharge and satisfaction. By way of distinguishing that case it will be observed that nothing was said about releasing and discharging from any and all claims for damages, as was done in the case at bar; that it was only in settlement of the suit then pending, and, as the court observed, was "not in settlement of the cause of action." In *Sloan v. Herrick*, 49 Vt. 327, a suit against one joint tort-feasor was discontinued without costs, but no satisfaction for the tort was received. It was held to be no bar to an action against the other, for the reason that, no satisfaction having been made, the plaintiff could pursue either until satisfaction ⁴³⁶ was received. In *Duck v. Mayeu* [1892], 2 Q. B. 511, a receipt was given to one for the payment of a certain sum, with the reservation that it was without prejudice to the claim against another. It was held that, as it appeared the parties did not intend it for a release, the effect was that it became a covenant not to sue, and was not a release. The above—an English case—would seem to support respondent's contention that the instrument under discussion in the case at bar is not a release, but is a covenant not to sue. The case of *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, upon first reading appears to support respondent's contention; but upon careful reading it will be observed that the damages sought were for the wrongful cutting and removal of timber. One of the wrongdoers had paid two hundred dollars in consideration of an agreement not to sue him. This was held not to be a bar to an action against the other for the amount of actual damage unpaid, on the theory that the damage was of such a character that the full amount was easily ascertainable by direct and positive proof, and was not dependent upon mere opinion evidence. But, as indicative of the views of the court when applied generally to the release of one joint tort-feasor, the concluding paragraph of the opinion states the following: "Notwithstanding any general remarks found in this opinion, it will be understood that the decision of the court goes no further than holding that the facts of this case do not show a release of the defendants from liability for damages, and that the majority of the members of the court do not now decide that a similar agreement made with one of two

or more joint trespassers in an action for an assault and battery, false imprisonment, or similar actions, in which the damages rest mainly in estimation and opinion, would not be a bar to an action against the others."

⁴³⁷ In *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140, one party paid twenty dollars, with the understanding that, if the claimant should at any time in the future decide to pursue the joint trespasser, he might do so upon refunding the sum so paid. The sum was not refunded, and action was brought against the other. It was held that the understanding amounted only to a covenant not to sue the one making the payment, and that it was not a release of the other. The case of *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752, holds that a paper not under seal, delivered to one joint trespasser, which shows upon its face that it was not the intention to satisfy and discharge the liability of the other, will not work a discharge of the other. The paper relied upon as evidence of a release in that case was as follows: "Received of John Jarrell, Jr., seventy-five dollars, it being in full of all dues, debts, and demands up to this date."

The court held that an absolute release of one joint trespasser discharges all the rest who participated, but that such release as a discharge for all that has been given to one only must be a technical release under seal, expressly stating the cause of action to be discharged without conditions or exceptions, and no release will be allowed by implication; and also held that the paper in question did not constitute a release within the rule declared. *Lovejoy v. Murray*, 3 Wall. 1, holds that a judgment against a joint trespasser is not a bar to an action against another joint trespasser unless the judgment is satisfied; that nothing short of satisfaction or its equivalent will amount to a good plea in bar.

Other cases cited by respondent relate to contractual obligations, and we think the above a fair review of the authorities cited bearing directly upon the principle under ⁴³⁸ discussion here. It will thus be seen that there is some conflict in authority, but we believe it is manifest from the foregoing that the decided weight of authority in this country is to the effect that such a release as is shown in this case operates to discharge all who participate in a joint tort. It is true it has been held, and doubtless correctly, that a mere agreement not to sue one is not a release of the others; but, when an injured party makes an estimate of the amount of damages he is willing to

receive from one, and accepts such sum with the agreement that it shall fully release and discharge the one making the payment, we think it is more than a mere agreement not to sue. It is a release of his cause of action in consideration of a satisfaction, and there is scarcely any dispute among the authorities that, where there is an absolute release of one, it operates to release all tort-feasors who participated in the same act.

Viewing the agreement and release as we do, it becomes necessary to reverse this case, and, since the construction to be placed upon the release lies at the foundation of any right of recovery under the issues, it is therefore unnecessary to grant a new trial. The judgment is therefore reversed and the cause remanded, with instructions to the lower court to dismiss the action.

Reavis, C. J., and Fullerton, White, Anders and Mount, JJ., concur.

RELEASE OF ONE JOINT TORT-FEASOR AS AFFECTING THE LIABILITY OF THE OTHERS.

- I. Discharge of One as the Discharge of All.**
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- IV. Reservation in Release of Right to Hold the Others.**
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- VI. Pendency and Dismissal of Suit Against One Tort-feasor.**

- a. Pendency of Suit—Settlement—Retraxit.
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VII. Recovery of Judgment Against One Wrongdoer.

- a. Whether Releases the Others.
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- c. Costs and Nominal Damages Against the Others.
- d. Effect of an Unsatisfied Judgment.
- e. Effect of Issuing Execution.

I. Discharge of One as the Discharge of All.

a. **The General Rule.**—Primarily, every person is liable for the injury caused by him. If he acts separately, he is separately liable for all the injury. If he acts jointly with others, he is both jointly and severally liable for the whole injury. There can be no separate estimate of the injury committed by each; there can be no apportionment of the responsibility between them. Each is considered as sanctioning the acts of all the others, thereby making them his own. There is but one injury, for which each is answerable in full. Hence, the familiar principle that a release to one joint tort-feasor, or an acceptance of satisfaction from one, discharges all. Where there has been only one wrongful act, there can be but one full and complete recovery. When that is obtained the injured party has exhausted his remedy. Compensation for the injury is all the law contemplates. A sufficient atonement having been made, though by only one of the wrongdoers, the whole matter is at an end, so far as the legal rights and liabilities of the parties are concerned. It is as though the wrong had never been done. Were this not so, one having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceeding as to all but one, and then sue him for the whole damage, as if no compensation had been made. Thus would be opened a door to a class of speculations not deserving encouragement. The rule of law that makes one satisfaction or release a bar to further claims for the same tort is founded in good reason and stands unquestioned: *Smith v. Gayle*, 58 Ala. 600; *Montgomery v. Erwin*, 24 Ark. 540; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135; *Chapin v. Chicago etc. R. R. Co.*, 18 Ill. App. 47; *Vingeant v. Scully*, 35 Ill. App. 44; *Allen v. Wheatley*, 3 Blackf. (Ind.) 332; *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344; *Irwin v. Scribner*, 15 La. Ann. 583; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Brown v. City of Cambridge*, 3 Allen, 474; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091; *Gould v. Gould*, 4 N. H. 173; *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628; *Comstock v. Hopkins*, 15 N. Y. Supp. 908, 61 Hun, 189; *Johanson v. City of New York*, 76 N.

Y. Supp. 119, 71 App. Div. 561; *Brown v. Kencheloe*, 3 Cold. (Tenn.) 192; *Cocke v. Jennor*, Hob. 66.

b. Accord and Satisfaction.

1. Complete Satisfaction.—The party suffering injury at the hands of joint tort-feasors is entitled to but one satisfaction therefor. If he settles his claim with one of them, or receives satisfaction from him, the rest are discharged of their liability and he cannot recover from them. While he may proceed against any or all at his pleasure, holding whomsoever he chooses answerable, he can have but one satisfaction: *Ballard v. Noaks*, 2 Ark. 45; *Urton v. Price*, 57 Cal. 270; *American Express Co. v. Patterson*, 73 Ind. 430; *Metz v. Soule etc. Co.*, 40 Iowa, 236; *Bryant v. Reed*, 34 Neb. 720, 52 N. W. 694; *Spurr v. North Hudson etc. R. R. Co.*, 56 N. J. L. 346, 28 Atl. 582; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Woods v. Pangburn*, 75 N. Y. 495; *Union Associated Press v. Press Pub. Co.*, 54 N. Y. Supp. 183, 24 Misc. Rep. 610; *Tilton v. Morgaridge*, 12 Ohio St. 98; *Floyd v. Browne*, 1 Rawle (Pa.), 125, 18 Am. Dec. 602; *Eastman v. Grant*, 34 Vt. 387; *Bird v. Randall*, 3 Burr. 1345; *Thurman v. Wild*, 11 Ad. & E. 453. The case is not different if the party thereafter sought to be charged is considered merely as an instigator of the tort: *Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143.

The bar arises, not from any particular form the proceeding may assume, but from the receipt and acceptance by the injured party of a satisfaction for the wrong done him: *Denver etc. R. R. Co. v. Sullivan*, 21 Colo. 302, 41 Pac. 501. It must appear, however, that he has received full compensation, or what he has accepted as full compensation: *O'Shea v. New York etc. R. R. Co.*, 105 Fed. 559, 44 C. C. A. 601. A receipt acknowledging a satisfaction from one tort-feasor may be explained by parol, and the fact shown that the accord was not actually executed: *McGehee v. Shafer*, 15 Tex. 198. If a mortgage is accepted conditionally in settlement and satisfaction of a claim on which an action is pending against another person liable as a tort-feasor equally with the mortgagor, but the condition is not performed, it cannot be pleaded in defense of the suit: *Cobb v. Malone*, 86 Ala. 571, 6 South. 6; *S. C.*, 91 Ala. 388, 8 South. 692. It is held, however, that the acceptance of the note of one of several cotrespanders in satisfaction of the wrong done by him, releases the others, although the note remains unpaid and is brought into court to be canceled: *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534.

2. Partial Satisfaction.

A. The General Effect of.—When, as has been seen, the plaintiff has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury; but he is not so affected until he has received full satisfaction, or that which the law considers such. If he receives part of the damages

from one of the wrongdoers, the receipt thereof not being understood to be in full satisfaction of the injury, he does not thereby discharge the others from liability: *Boyles v. Knight*, 123 Ala. 289, 26 South. 939; *Heimaman v. Kinnare*, 92 Ill. App. 232; *McGrillis v. Hawes*, 38 Me. 566; *Irvine v. Mulbank*, 15 Abb. Pr., N. S., 378; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518. Such partial satisfaction operates only as a satisfaction pro tanto in favor of the rest of the tort-feasors. Thus far, however, they may show it in mitigation of damages, and they can be made to respond only for the balance: *Smith v. Gayle*, 58 Ala. 600; *Meixell v. Kirkpatrick*, 29 Kan. 679, 684; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Merchants' Bank v. Curtis*, 37 Barb. 317; *Knapp v. Roche*, 94 N. Y. 329; *Heyer Bros. v. Carr*, 6 R. I. 45; *Chamberlin v. Murphy*, 41 Vt. 110.

For example, when a portion of property wrongfully taken is returned and accepted, there is a reduction pro tanto from the total damages that otherwise would be allowed: *Bowman v. Davis*, 13 Colo. 297, 22 Pac. 507. And where one is injured in a collision between the cars of a railroad and a street-car company, and the latter pays him five hundred dollars, in addition to compensating him for lost time, paying his doctor's bill, and the like, he is not precluded from recovering from the railroad company, provided he has executed no release, though the amount received must be applied in reduction of his recovery: *Chicago etc. R. R. Co. v. Hines*, 82 Ill. App. 488. If joint tort-feasors are severally sued, the receipt of money in settlement of the action against one is not a discharge of the others, unless received in satisfaction of the whole injury: *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. 927.

B. Unliquidated Claims.—Such, in our opinion, is clearly the rule when the amount of the claim is definite and known; but we are not so confident in cases where the damages are uncertain and unliquidated: See *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533. On this question we quote from *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518, a case of a joint trespass on real estate: "It is insisted by the counsel for the respondent that when the contract which is set up as a release of one of several joint wrongdoers is not a technical release, the construction of which is fixed by the law, then the intention of the parties is to govern; and if it be clear that there was no intention on the part of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties, then any agreement of the injured party not to prosecute one or more of several wrongdoers, in consideration of the payment of a specified sum of money, does not discharge the other wrongdoers, except to the extent of the money so received. In other words, when the contract is not of such a nature that the law deems it

conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the court or jury whether what he has received of the one wrongdoer was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only pro tanto a bar to an action against the other wrongdoers. And this view of the case, we think, is sustained by the great weight of authority in all cases where the amount of the damages is the subject of proof and computation, as in this case, though there is some conflict in those cases where the damages are not the subject of proof and computation, but rest mostly in the discretion of the jury, as in cases of assault and battery, slander, libel, false imprisonment and actions of that nature.

"It is probable that one reason why the rule above stated has not been so universally adopted by the courts in the class of actions above named is that in such cases the real amount of injury which the plaintiff has sustained is so much a matter of uncertainty that it would be very difficult to tell before a verdict was obtained what they were, and any sum received from one of the wrongdoers to buy his peace might well be considered a full compensation for the injury sustained. In cases where there is no technical release and discharge of one of several wrongdoers, whether the receipt of money from one, accompanied with an agreement not to prosecute him for the wrong, is a discharge of the other wrongdoers, depends upon the question whether such money was received as an accord and satisfaction for the whole injury. If it was, then all are discharged; if it was not, but only as a part satisfaction, then it is a discharge of the others only pro tanto. A court or jury would more readily infer that a receipt of two hundred dollars from a party who has assaulted and beaten another, by the party injured, was intended as a satisfaction for the whole injury done, than if the same sum had been received by the injured party of one of two or more persons who had tortiously converted a thousand bushels of wheat, worth a thousand dollars. The distinction made by the courts between the class of cases above mentioned, where there is no fixed legal measure of damages, and those where there is a fixed legal measure, is considered and commented upon in the following cases: *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *McCrillis v. Hawes*, 38 Me. 568; *Knickerbocker v. Colver*, 8 Cow. 111; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Eastman v. Grant*, 34 Vt. 390."

C. Agreements not to Sue.—In cases where it is not the apparent intention of the parties to discharge or release the claim for damages, but only to relieve one party from liability on his payment of a part of the demand, courts have considered the agreement as merely a covenant not to sue the party discharged: See *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518. Such a covenant, as will be seen

hereafter, does not operate to release the remaining wrongdoers: See "Covenant not to Sue One Tort-feasor," post, p. 882.

D. Parol Evidence to Explain.—An instrument in writing, given to one of two joint wrongdoers, reciting the receipt from him of a certain amount "as full payment, as per claim," bars an action against the other; and parol evidence will not be received to show that the sum paid was intended to be received as part, and not full, payment: *Goss v. Ellison*, 136 Mass. 503. "If this could be treated merely as a receipt," said the court, "it might be open for the plaintiff to show by parol that it was not intended as full payment and satisfaction of his claim against Ruggles. But it was more than a receipt. It is not only an acknowledgment of the receipt of Ruggles' note for fifty-one dollars, but it is a statement of what the note was received for. It was received 'as full payment' for the plaintiff's claim against Ruggles."

c. Release under Seal.

1. Effect of, Generally.—Satisfaction for the injury to the complaining party must appear before the discharge of one joint wrongdoer will bar an action against the others. But satisfaction may be accomplished or shown in two ways: As a matter of fact, as has hereinbefore been considered; and as a matter of law, by a technical release. When a technical release, which must be under seal, is given by the injured person to one of several joint tort-feasors, it is quite uniformly held, at least in those jurisdictions where seals are regarded with their ancient sanctity, that this will discharge all, and be a bar to any further remedy for the wrong. The release, being under seal and absolute, cannot, because of the very nature of such technical instruments, be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction for the injury, and upon a sufficient consideration: *Arnett v. Missouri Pac. Ry. Co.*, 64 Mo. App. 368; *Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Irvine v. Milbank*, 15 Abb. Pr., N. S., 378; *Smithwick v. Ward*, 52 N. C. (7 Jones) 64, 75 Am. Dec. 453; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *Brown v. Marsh*, 7 Vt. 320; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

"The deed being taken most strongly against the releasor," remarks Justice Bronson, "is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort-feasors, no foundation remains for an action against anyone": *Bronson v. Fitzhugh*, 1 Hill, 185. Again, observes Justice Bigelow, in *Stone v. Dickinson*, 7 Allen, 26, "the amount of compensation which the plaintiff had received from one of the tort-feasors was wholly immaterial. It is a conclusive answer to this suit that he had by a release under seal discharged one of the persons who had joined in subjecting him to the false imprison-

ment alleged in the declaration. A release of one operated as a release of all."

While, as is above mentioned, a release, to have this effect, must be a technical release under seal, a release is of course valid, and will bar any recovery from the other wrongdoers if based upon a sufficient consideration, which consideration appears from the instrument itself or is susceptible of extrinsic proof: See *Heckman v. Manning*, 4 Colo. 543; *Stevens v. Hathorne*, 12 Allen, 402. The seal simply imports a consideration, and is conclusive evidence that a consideration passed between the parties. But in those states where the common-law rule has been abrogated, and sealed instruments reduced to the rank of simple contracts, they are, in general, subject to the same scrutiny and rules of construction, when they come before the courts, as are other contracts in writing. And this is true of releases discharging one joint tort-feasor: See *Smith v. Gayle*, 58 Ala. 600; *Fitzgerald v. Smith*, 1 Ind. 310.

2. **Evasion of.**—In conclusion, we call attention to a means of evading the effect of a technical release, as stated in *Schramm v. Brooklyn Heights R. R. Co.*, 54 N. Y. Supp. 945, 35 App. Div. 331. "A release of one of several joint tort-feasors will discharge all, but to effect this result the instrument must be a technical release under seal: *Irvine v. Millbank*, 56 N. Y. 635; *Morgan v. Smith*, 70 N. Y. 537. The appellant contends that the plaintiff could not do indirectly what he could not do directly. The reverse of this proposition is true. The plaintiff may practically discharge one of several joint tort-feasors without losing his claim against the others, if he does it in the right way: *Miller v. Fenton*, 11 Paige, 18; *Pond v. Williams*, 1 Gray, 630. The rule that a release under seal conclusively establishes satisfaction of the claim is entirely technical, and technicality has been employed to avoid the effect of the rule; hence, we have covenants not to sue, etc., which do not operate as releases except in favor of the party to whom they are given." Of agreements not to sue, and agreements having a similar operation, more will be said under the head of "Covenants not to Sue One Tort-feasor," post, p. 882.

II. Discharges in Particular Cases.

a. **Liquor Sellers under Civil Damage Acts.**—Under the civil damage acts giving a right of action for injuries arising from the sale or gift of intoxicating liquors, each liquor seller contributing to the intoxication of a person is liable for the results: *Werner v. Edmiston*, 24 Kan. 147. And in a number of cases it has been decided that the common-law principle, that the release of one joint tort-feasor discharges the others, applies under the dram-shop statutes, so that if satisfaction is obtained, by the person having a right of action, from one of the liquor sellers who has contributed to the intoxication, the others who have also contributed to the same result are

discharged with him: *Stanley v. Leahy*, 87 Ill. App. 465; *Kearney v. Fitzgerald*, 43 Iowa, 580; *Putney v. O'Brien*, 53 Iowa, 117, 4 N. W. 891; *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170. From the last case we take this extract: "If she [a wife] were to recover a joint judgment against several, a payment of the judgment by one of them would discharge it as against all. If she elects to bring several actions, and recovers several judgments, she may indeed gain an advantage by being enabled to collect that judgment which is for the largest amount, but a satisfaction of any one of the judgments would operate as a satisfaction of all, except the costs, and bar any other action for the same cause. In other words, she can have but a single satisfaction. By giving her a right to bring several actions, the statute does not have the effect to give her a right to multiply her damages. When she has received satisfaction for the damages sustained by her, her right of action is gone. The effect of the statute is to put all who contributed to her husband's intoxication in the position of joint tort-feasors or trespassers."

"The reasoning of these cases," says Justice Dwight, "commends itself to our judgment, although we are of the opinion that the conclusion reached does not depend upon the principle that the persons so jointly liable for the injury complained of are joint wrongdoers. It is difficult to see how a man, who does that which he is expressly licensed to do under one statute of the state, can be treated, for that act, as a wrongdoer by or under another statute of the state. . . . It is true that the unlicensed dealer is a wrongdoer, . . . but the civil damage law applies with equal force to the licensed as to the unlicensed dealer, and, therefore, it cannot well be said that the liability imposed by it is the liability of wrongdoers. . . . But it is not necessary that the persons liable to such an action as this should be wrongdoers in order to give application to the rule that satisfaction by one is satisfaction as to all. On the contrary, we think the rule has application to both classes of cases upon a principle which is common to both, namely: That there can be no apportionment of damages between the persons liable. So it is with joint wrongdoers from the nature of the case, and so it is with persons liable under the statute in question from the very terms of the statute, which impose an undivided liability upon any person or persons whose sale or giving away of liquor has caused the intoxication, in whole or in part, from which the injury complained of has resulted": *Comstock v. Hopkins*, 15 N. Y. Supp. 908, 61 Hun, 189.

b. Railway Cases.—The principle under discussion is not infrequently illustrated in railway cases. Thus, when a passenger injured by a collision of street railway cars brings suit against both companies, a release of the carrying company from all liability for the injury, in consideration of a sum paid to the plaintiff, operates as a discharge of the other company from liability also: *Seither*

v. Philadelphia Traction Co., 125 Pa. St. 397, 11 Am. St. Rep. 905, 17 Atl. 338. To the same effect is *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165. And when an engineer on one railroad is injured in a collision between its engine and that of another railroad on its tracks to obtain water, and he recovers, in different actions, a judgment against each company, if the company employing him settles the judgment recovered against it, taking from him a release and an assignment of the judgment against the other company, the facts present a case of a joint tort, and a satisfaction by one tort-feasor discharges the other: *Gross v. Pennsylvania etc. R. R. Co.*, 65 Hun, 191, 20 N. Y. Supp. 28.

c. Marriage of Female Tort-feasor by Plaintiff.—A curious application of the rule that the release of one joint wrongdoer is the release of all is found in *Turner v. Hitchcock*, 20 Iowa, 310. In that case a number of women organized, and made a raid upon the saloon of the plaintiff, destroying liquors, glasses, oysters, candies, etc. Before bringing suit for the injury inflicted, he married one of the women who took part in the destruction of his property. The marriage was held to operate as a discharge of all the wrongdoers. "The fact remains," it is said in the course of the opinion, "that the plaintiff did marry one of the wrongdoers. By this act he has absolutely barred all right of recovery for the alleged injury, as against her, as effectually as if he had executed a written release to her for a valuable consideration. Not only so, but (what a written release would not have done) he has placed her, in virtue of her marital rights, in a position to reap the fruits of her own wrong, by sharing with him whatever compensation may be recovered from her cotrespanders." The decision was vigorously dissented from by Justices Wright and Cole, the former remarking that it would be a bold jurist who would claim that the marriage of a creditor to one of his joint debtors would have the effect of releasing the others.

III. Parties to the Discharge.

a. Infants.—In the case of *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88, one of full age and an infant had jointly assaulted and beaten another infant, and the infant only was sued for the trespass, who pleaded an accord and satisfaction between the plaintiff and the adult cotrespasser. It was held that the plaintiff was not bound by the adjustment. After commenting on the legal disabilities of minors, Justice Parsons concludes: "The law, however, will not admit these principles to be made an engine of fraud and injustice; and in the case at bar, if the jury on the trial are convinced that the satisfaction received from Dennis was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation should be found inadequate, the jury will give such further sum as, with the money received from Dennis, will amount to a reasonable satisfaction. The law very

properly will not trust an infant to fix a value on his own rights. But this power is devolved on a jury, who will do justice to all parties."

b. Discharge of Strangers.

1. Effect on Those Liable.—The question of whether a release to, or a satisfaction from, a person not shown to be liable as a joint wrongdoer, comes within the rule that a discharge of one joint wrongdoer is the discharge of the others, is attended with no little difficulty, on principle, and the authorities are more or less conflicting. Many cases hold that the rule applies only where the money is paid by, or the release executed to, one who is himself actually guilty of the wrong. In other words, a release to, or a settlement with, one not in fact liable to the releasor or not shown to be a joint tort-feasor in, although perhaps connected with, the wrong committed, does not destroy the right of action against those who otherwise are liable. To our mind this is not unreasonable, and it seems to be supported by the weight of authority: See *Wagner v. Union etc. Co.*, 41 Ill. App. 408; *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Kentucky etc. Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *Missouri etc. Ry. Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Iddings v. Citizens' State Bank (Neb.)*, 92 N. W. 578; *Mathews v. Lawrence*, 1 Denio, 212, 43 Am. Dec. 665; *Atlantic Dock Co. v. Mayor*, 53 N. Y. 64; *Thomas v. Central R. R. Co.*, 194 Pa. St. 511, 45 Atl. 344; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126.

On the other hand, it is held, in *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, that the rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not in fact be liable. This doctrine is supported by *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397, 11 Am. St. Rep. 905, 17 Atl. 338; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091.

2. Distinction Between Release and Satisfaction.—Some authorities distinguish, in this connection, between the effect of a simple release and a satisfaction in fact. Thus, it is said, in *Pisano v. Shanley Co.*, 66 N. J. L. 1, 48 Atl. 618, that "whatever effect satisfaction for the injury complained of, made by a third party, may have upon a suit of this character, a simple release to a stranger would not be a bar." And, quoting from *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344: "As we have seen, it is entirely immaterial that the one from whom satisfaction was demanded and received was not liable for the entire damage. Indeed, if he were a stranger, and not responsible for any part of it, the rule would be the same. It is important that we distinguish in this connection between what the law denominates a 'release' and what is called a 'satisfaction.'"

A release may be given, although no part of the damage has been paid, and a technical release to one who is not a joint wrongdoer will not release another, who may have had some connection with the wrong. See, as illustrating this rule, *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Knapp v. Roche*, 94 N. Y. 329; *Turner v. Hitchcock*, 20 Iowa, 310. A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action."

IV. Reservation in Release of Right to Hold the Others.

a. **Whether will be Given Effect.**—In many instances of the discharge of one joint tort-feasor, it is stipulated that his release shall not release the others. According to perhaps the weight of authority, such a release discharges all the wrongdoers, notwithstanding the stipulation to the contrary: See *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *Mitchell v. Allen*, 25 Hun, 543; *DeLong v. Curtis*, 35 Hun, 94; *Brogan v. Hanan*, 66 N. Y. Supp. 1066, 55 App. Div. 92; *Smith v. Consolidated Gas Co.*, 72 N. Y. Supp. 1084, 36 Misc. Rep. 131; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Ruble v. Turner*, 2 Hen. & M. (Va.) 38; *Abb v. Northern Pac. Ry. Co.* (the principal case), ante, p. 864, 68 Pac. 954; *Babcock & Wilson Co. v. Pioneer Co.*, 32 Fed. 338; *O'Shea v. New York etc. R. R. Co.*, 150 Fed. 559. In our opinion, however, the intention of the parties in such cases should be given effect. And if the instrument releasing one joint tort-feasor expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. This is the doctrine enunciated in *Gilbert v. Finch*, 173 N. Y. 455, 93 Am. St. Rep. 619, 66 N. E. 133. To our mind it is more reasonable than the holding of the Washington court in the principal case. It is supported by the earlier cases of *Matthews v. Chicopee Mfg. Co.*, 3 Rob. (N. Y.) 711; *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533. See, in this connection, "Partial Satisfaction," ante, p. 874, and "Covenants not to Sue One Tort-feasor," post, pp. 882, 883.

V. Covenant not to Sue One Tort-feasor.

a. **Does not Release the Others.**—Incidentally, agreements not to sue one of several wrongdoers have already been considered in this note. (See ante, pp. 876, 881.) It is well settled that a covenant not to sue one joint tort-feasor does not operate to discharge the others, in the absence of a release and satisfaction. The fact that the covenantor, or injured party, receives partial satisfaction from the covenantee does not vary the rule. In determining whether the agreement is a release or a covenant to sue, the intention of the parties should be sought, and the courts do not seem averse to a construction in favor of the latter: *Chicago v. Smith*, 95 Ill. App. 335; *Bell v. Townsend*, 43 Iowa, 368; *Arnett v. Missouri Pac. Ry. Co.*, 64 Mo. App. 368; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Irvine*

v. Milbank, 15 Abb. Pr., N. S., 378; *Spencer v. Williams*, 2 Vt. 209; *Duck v. Mayen*, 2 Q. B. [1892] 511.

The legal effect of such a covenant is very different from that of a release. A covenant to sue a sole wrongdoer is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such wrongdoer. But the rule is otherwise where there are two or more wrongdoers, and the covenant is made with one not to sue him. In such a case the covenant does not operate as a release of either the covenantee or the other wrongdoers, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to an action against him: *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271.

VI. Pendency and Dismissal of Suit Against One Tort-feasor.

a. **Pendency of Suit—Settlement—Retraxit.**—A plea in abatement that another action is pending by the same plaintiff against one who is jointly guilty with the defendant of the commission of the tort for which the plaintiff seeks to recover is not sustainable: *State v. Boyce*, 72 Md. 140, 20 Am. St. Rep. 458, 19 Atl. 366. Yet, where separate actions are pending against several joint trespassers, the settlement of one of the actions and a discharge of the defendant therein will operate as a discharge of the entire cause of action against all, and a recovery in the other suits cannot be had: *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154. And where several joint tort-feasors have sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all: *Chetwood v. California Nat. Bank*, 113 Cal. 414, 649, 45 Pac. 704, 854.

b. **Pendency in Federal Court.**—In an action to recover for death caused by the wrongful act of several defendants, the fact that part of them availed themselves, in a federal court, of the limited liability fixed by a federal statute, and that the plaintiff appeared therein to claim damages, is no bar to his right to maintain a suit in the state court against the other tort-feasors while the action is pending in the federal court, provided he has not received satisfaction: *Grundel v. Union Iron Works*, 127 Cal. 438, 78 Am. St. Rep. 75, 59 Pac. 826.

c. **Dismissal or Nolle Prosequi.**—A release to one of several joint wrongdoers, as has already appeared, is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. But if the injured party sues them all, and, pending the suit, dismisses or discontinues it, or enters a nolle prosequi, as to one or more of the defendants, he is not thereby barred from proceeding against the remaining defendant or defendants. This he may do at any time before judgment, even after verdict, and still proceed to judgment against any not dismissed: *Slade v. Street*, 77 Ala. 576; *Montgomery Gaslight Co. v. Montgomery etc. Ry. Co.*, 86 Ala. 372, 5 South. 735; *Callaghan v. Myers*,

89 Ill. 566; *West Chicago St. R. R. Co. v. Piper*, 165 Ill. 325, 45 N. E. 186; *Gillen v. Wilson*, 2 T. B. Mon. (Ky.) 11; *Sellards v. Zomes*, 5 Bush (Ky.), 90; *Riley v. McGee*, 1 A. K. Marsh. (Ky.) 432; *Gusdorff v. Duncan*, 94 Md. 160, 50 Atl. 574; *Thomas v. Hoffman*, 22 Mich. 45; *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152; *Allen v. Craig*, 13 N. J. L. 294; *Weakley v. Roger*, 3 Watts (Pa.), 460; *United States v. Linn*, 1 How. 104. A vacation of the judgment and a dismissal of the suit as to one, however, might, it has been intimated, have a different effect: *McCool v. Mahoney*, 54 Cal. 491.

"The persons guilty," observes Justice Blackford, "are separately liable to the party injured, and he has a right to sue one or all or any number of them. If the plaintiff commence suit against several, he may, at any time before judgment, enter a nolle prosequi as to any of them. Even after a joint plea in an action of trespass, and after a verdict that the defendants are jointly guilty, the plaintiff may enter a nolle prosequi as to some and take judgment as against the others. The case before us is one of assault and battery, in which the writ was served on, and the judgment entered against, four only of the six persons against whom the plaintiff complained. Why is this wrong? As the action might have been originally instituted against these four, so, at any time before judgment, the plaintiff might elect to take his damages against them alone, and abandon his action against the others. He might, even after his verdict against the four, have entered a nolle prosequi as to two, and taken judgment against the rest": *Palmer v. Crosby*, 1 Blackf. (Ind.) 138, 139; *Birkel v. Chandler*, 26 Wash. 241, 251, 66 Pac. 406.

If separate actions have been commenced against two joint tort-feasors, and one prosecuted to judgment, a dismissal of the pending action on payment of costs does not affect the judgment: *Beil v. Perry*, 43 Iowa, 368. And where, in an action of trover against defendant and H., judgment is rendered against H. and for defendant, and appeals are taken by H. and the plaintiff, whereupon plaintiff discontinues as to H. on his agreement to waive his claim for costs, the discontinuance is held not to bar a recovery of full damages against defendant: *Sloan v. Herrick*, 49 Vt. 327.

Where the plaintiff's attorney agrees conditionally, after action has been commenced, to dismiss it against one joint tort-feasor, without the knowledge or consent of the plaintiff, this does not discharge the other defendants: *Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497. And if an action is brought against less than the whole number of joint tort-feasors, the plaintiff may, after a discontinuance of the action, join others of them in a subsequent action against one or more of the defendants in the prior action: *Bishop v. McGillis*, 82 Wis. 120, 51 N. W. 1075.

VII. Recovery of Judgment Against One Wrongdoer.

a. Whether Releases the Others.—The recovery and satisfaction of a judgment against one joint tort-feasor extinguishes the cause of action against the others, and operates to discharge all from further liability to the injured party: *Vandiver v. Pollak*, 107 Ala. 547, 54 Am. St. Rep. 118, 19 South. 180; *Mitchell v. Libbey*, 33 Me. 74; *Berkley v. Wilson*, 87 Md. 219, 29 Atl. 502; *Luce v. Dexter*, 133 Mass. 23; *Grimes v. Williams*, 113 Mich. 450, 71 N. W. 835; *Blackman v. Simpson*, 120 Mich. 377, 79 N. W. 573; *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441. But to have this effect, the satisfaction must be such as is voluntarily accepted by the plaintiff. Thus, the voluntary and unsolicited payment to the clerk of the court of a judgment recovered against one joint tort-feasor does not bar the right to proceed against the others, when it is not shown that the plaintiff has sanctioned the act of the clerk: *Blann v. Crocheron*, 20 Ala. 320; *McDonald v. Nugent* (Iowa), 92 N. W. 675.

The reason for this latter rule will appear when we consider that, if the injured party proceeds to separate judgments against several joint wrongdoers, he may then elect to have execution on the largest judgment or against the most solvent defendant, although he is of course entitled to the satisfaction of but one judgment: *City of Roodhouse v. Christian*, 55 Ill. App. 107; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909; *Page v. Freeman*, 19 Mo. 421; *Brisson v. Dougherty*, 3 Baxt. (Tenn.) 93. If the satisfaction which the law declares shall bar any further recovery is otherwise than that which the plaintiff voluntarily receives, then one wrongdoer, or all of them, by concerted action through the one, might in fact exercise the election which the law gives the plaintiff the right to make, and thereby defeat the very object of the rule giving the injured party a right to bring separate actions, prosecute them all to judgment, and then elect which judgment he will enforce.

b. Partial Satisfaction of Judgment.—It already has been noticed that satisfaction in part, received from one joint tort-feasor, does not work the discharge of the others. (See ante, p. 874.) This principle is applicable to the case of judgments. In order to constitute a judgment against one a bar to liability on the part of all, such judgment must be fully satisfied. A partial satisfaction is no bar, except pro tanto: *McVey v. Manatt*, 80 Iowa, 132, 45 N. W. 548; *United Society of Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214. If the plaintiff proceeds to separate judgments, his election to have execution on one precludes his right to resort to the other, only when he has full and actual satisfaction out of the elected judgment. If such judgment yields only a partial satisfaction, he may still proceed against the other defendants for the balance: *Brisson v. Dougherty*, 3 Baxt. (Tenn.) 93. But a recovery in full upon one judgment puts an end to the plaintiff's remedy. And

if, in a suit against one of the wrongdoers, he demands less than he is entitled to, or if he sues for all and recovers less, he will not be permitted, after the payment and acceptance of the amount recovered, to maintain an action against the other for the balance to which he was entitled, or which he might have demanded in the first instance: *Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881.

c. **Costs and Nominal Damages Against the Others.**—In separate actions against joint tort-feasors, the plaintiff, while entitled to a judgment against each for the full amount, cannot demand the satisfaction of but one judgment: *Corey v. Havener* (Mass.), 65 N. E. 69; and when this is had, the court will direct a satisfaction to be entered as to the others, upon payment of the costs: *Hawkins v. Hatton*, 1 Nott & M. (S. C.) 318, 9 Am. Dec. 700; *Smith v. Singleton*, 2 McMull. (S. C.) 184, 39 Am. Dec. 122. He may, however, have costs in all the actions: *Knickerbocker v. Colver*, 8 Cow. 111; *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689. But it has been held that, after judgment and execution for damages and costs have been recovered against one wrongdoer, while actions are pending against the others, judgments for nominal damages cannot be entered in these actions, so as to enable the plaintiff to recover the costs thereof also: *Savage v. Stevens*, 128 Mass. 254. And it has also been held that where separate actions are pending against the wrongdoers, and a settlement of one of the actions with a discharge of the defendant therein is made, there can be no recovery in the other suits, either of nominal damages or of costs: *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154.

d. **Effect of an Unsatisfied Judgment.**—In England the rule prevails that an unsatisfied judgment against one wrongdoer may be pleaded in bar of an action against another joint wrongdoer: See the notes to *Blann v. Crocheron*, 54 Am. Dec. 205; *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 907. And two American courts, relying on the English decisions, have fallen into the same error: See *Hunt v. Bates*, 7 R. I. 217, 82 Am. Dec. 592; *Petticolas v. Richmond*, 95 Va. 456, 64 Am. St. Rep. 811, 28 S. E. 566. We have already shown that nothing short of full satisfaction, or that which the law considers as such, when moving from one joint tort-feasor, can work the discharge of the others. And this rule applies where a judgment is recovered. There must be both a recovery and a satisfaction. The mere recovery of a judgment against one tort-feasor, standing unsatisfied, is no bar to an action against any or all the others, who were jointly implicated with him in the commission of the wrong. The reasons for this rule would seem so plain that he who runs may read them. We shall attempt no exposition of them at this time, but make reference especially to the cases of *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Cleveland v. City of Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; *Lovejoy v. Murray*, 3 Wall. 1. Other cases squarely supporting this doc-

trine are *Blann v. Crocheron*, 19 Ala. 647, 54 Am. Dec. 203; *Bose v. Marx*, 52 Ala. 506; *Slade v. Street*, 77 Ala. 576; *Criner v. Brewer*, 13 Ark. 225; *Grundel v. Union Iron Works*, 127 Cal. 438, 78 Am. St. Rep. 75, 59 Pac. 826; *Vincent v. McNamara*, 70 Conn. 332, 39 Atl. 444; *City of Roodhouse v. Christian*, 158 Ill. 137, 41 N. E. 748; *Elliot v. Porter*, 5 Dana (Ky.), 299, 30 Am. Dec. 689; *Jones v. Lowell*, 35 Me. 538; *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458; *Fowler v. Owen*, 68 N. H. 270, 73 Am. St. Rep. 588, 39 Atl. 329; *Marsh v. Berry*, 7 Cow. 344; *Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498; *Martin v. Buffalo*, 128 N. C. 305, 83 Am. St. Rep. 679, 38 S. E. 902; *Wright v. Lathrop*, 2 Ohio, 33, 15 Am. Dec. 529; *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685; *Knott v. Cunningham*, 2 Sneed (Tenn.), 204; *Sanderson v. Caldwell*, 2 Aiken (Vt.), 195; *Griffie v. McClung*, 5 W. Va. 131; *Sessions v. Johnson*, 95 U. S. 347; *Collard v. Delaware etc. R. R. Co.*, 6 Fed. 246; *American Tel. Co. v. Albright*, 32 Fed. 287.

e. Effect of Issuing Execution.—While recognizing the principle that the injured party may proceed in separate actions against joint wrongdoers and obtain a judgment against each, and then elect as to which judgment he will enforce, some authorities contend that having made his election, he cannot resort to the others, and though he fails to obtain satisfaction, he cannot have recourse against the other wrongdoers: *White v. Philbrick*, 5 Me. 147, 17 Am. Dec. 214, overruled in *Cleveland v. City of Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; *Boardman v. Acer*, 13 Mich. 77, 87 Am. Dec. 736; *Kenyon v. Woodruff*, 33 Mich. 310. The Indiana court have stated the rule thus: "The injured party, if he choose, may sue several joint trespassers separately, and prosecute each suit to a final judgment, but there he must stop and elect against whom he will take his execution. . . . He cannot have two separate executions. Hence, a final judgment and an execution, or an order for an execution, against one of several joint trespassers, is a discharge of all the others": *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

We cannot see what the mere issue of an execution affects more than the recovery of a judgment. The judgment must be satisfied in order to work a discharge. And the mere issuing of an execution, while it may be *prima facie* evidence of a satisfaction, is nothing more. We are unable to understand what efficacy there can be in the mere issuing of the execution, when it is conceded that an unsatisfied judgment against one is no bar to proceeding against the other tort-feasors: See *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Norfolk Lumber Co. v. Simmons*, 2 Mary. (Del.) 317, 43 Atl. 163; *Osterhout v. Roberts*, 8 Cow. 43. See, also, "Partial Satisfaction of Judgment," ante. In *Cleveland v. City of Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892, the court, in passing

upon this question, said: "In Freeman on Judgments, section 236, the author says: 'A few cases . . . decide that the mere issuing of an execution is a conclusive election to consider the defendant as exclusively responsible. But a majority of the American cases discountenances this manifest absurdity. . . . How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned in committing an injury; which sustains him until the liability of every wrongdoer is severally determined and evidenced by a final judgment; and which, after thus "holding the word of promise to his ear, breaks it to his hope," by forbidding him to attempt the execution of either judgment, upon penalty of releasing all the others.'"

JOERGENSEN v. JOERGENSEN.

[28 Wash. 477, 68 Pac. 913.]

PLEADING.—The Defense of the Statute of Limitations Cannot be Presented by a Demurrer suggesting that the complaint does not state facts sufficient to constitute a cause of action. (p. 889.)

NEGOTIABLE INSTRUMENTS—Days of Grace.—No action can be sustained on a negotiable promissory note before the expiration of the last day of grace. (p. 890.)

NEGOTIABLE INSTRUMENTS.—A note providing that a sum therein named shall be paid at a date specified, but suggesting the possible contingency on which it must be paid at an earlier date, is a negotiable instrument. (p. 891.)

J. A. Coleman, for the appellant.

477 **ANDERS, J.** The complaint in this action alleges: 1. That on March 13, 1890, the defendants executed and delivered **478** to the plaintiff their certain promissory note in writing, in words, letters, and figures as follows, to wit:

"\$661.00

Stanwood, W., March 13th, 1890.

"Four years from the 22d day of March, A. D. 1890, or before, we, the undersigned, jointly and severally, promise to pay to Johan Joergenson, or order, the sum of six hundred and sixty-one dollars, without interest. If we sell or remove the timber that we have bought on said Johan Joergenson's homestead claim, before the expiration of said four years, then this note shall be paid at the times of such sale or removal of said timber. Value received.

"CHRISTIAN JOERGENSEN.

"MRS. CHRISTINE JOERGENSEN."

2. That this plaintiff is the owner and holder of said note, and that no part thereof has been paid. The plaintiff demanded judgment against the defendants, and each of them, for the said sum of six hundred and sixty-one dollars, with interest thereon at the rate of eight per cent per annum from March 22, 1894, and for costs of this action. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them, or either of them. The demurrer was sustained, and, the plaintiff having elected to stand upon his complaint, the action was dismissed on motion of counsel for defendants, and judgment entered for the defendants for their costs and disbursements. From this judgment the plaintiff has appealed to this court, and he alleges that the superior court erred (1) in sustaining the demurrer, and (2) in dismissing the action.

It appears to us too plain for controversy that the complaint states a cause of action. It is therein alleged that the respondents executed and delivered to appellant the note described therein, that appellant is the owner and holder thereof, and that the same has not been paid. No further allegations were either necessary or proper, and ⁴⁷⁹ it would seem necessarily to follow that the trial court erred in sustaining the demurrer to the complaint. It is stated, however, in the brief of appellant, that, as a matter of fact, counsel for respondents did not, upon the hearing of the demurrer, contend that the complaint did not state facts sufficient to constitute a cause of action against the respondents, but urged that it appeared upon the face of the complaint that the action was barred by the statute of limitations. Assuming that to be true, it is obvious that a question was argued and considered which was not presented by the demurrer to the complaint. When it appears upon the face of the complaint that the action was not commenced within the time limited by law, the objection may be taken by demurrer: Ballinger's Code, sec. 4907, subd. 7. But no such objection can properly be raised upon a demurrer which merely alleges that the complaint does not state facts sufficient to constitute a cause of action: Board v. First Presbyterian Church, 19 Wash. 455, 53 Pac. 671.

The reason why the superior court sustained the demurrer to the complaint does not specifically appear in the record, but it is asserted by counsel for appellant that its decision was based upon the notion that the note in question was not negotiable, because of the provision therein that, "If we sell or remove the

timber that we have bought on said Johan Joergenson's homestead claim, before the expiration of said four years, then this note shall be paid at the time of such sale or removal of said timber." And if that be true, then the court must have proceeded upon the theory that, if the note was not negotiable, the action was barred by the statute of limitations, for on no other hypothesis that we can perceive could the question whether it was negotiable or not have been deemed material. The note sued on, if not negotiable, became ⁴⁸⁰ due on March 22, 1894; but if it was negotiable, it did not become collectible until March 25, 1894, for the maker was entitled to his three days of grace: Ballinger's Code, section 3655. An action on a promissory note is not barred by the statute of limitations in this state until six years after a cause of action thereon has accrued: Ballinger's Code, sec. 4798. And no action can be maintained on a negotiable promissory note before the expiration of the last day of of grace: *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220; *Estes v. Tower*, 102 Mass. 65, 3 Am. Rep. 439.

This action was commenced on March 24, 1900, and, assuming that the note in question is negotiable, it follows that the action was begun within the time limited by law. The statute applicable to this case defines "negotiable notes" as follows: "All notes in writing made and signed by any person whereby he shall promise to pay to any other person or his order, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange according to the custom of merchants": Ballinger's Code, sec. 3650.

Under this statute, which is but declaratory of the pre-existing law, the promissory note in controversy is, according to the great weight of authority, clearly a negotiable instrument. It contains all the essentials of such an instrument as defined by text-writers and by the courts.

"A promissory note . . . is an open promise in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money absolutely and at all events": 1 *Daniel on Negotiable Instruments*, 4th ed., sec. 28.

The promise in the instrument in question is that the promisor will pay a certain sum of money, absolutely and at all events, to a person therein designated, or to his order, ⁴⁸¹ at a fixed and definite time; and the stipulation that the maker shall pay the note before the expiration of the said four years,

if he shall sell or remove certain timber from appellant's homestead claim, did not change or destroy his absolute liability to pay at the time designated, namely, "four years from the twenty-second day of March, A. D. 1890." The mere fact that a note may become due prior to the time of its absolute payment, upon the happening of a certain event, does not affect its negotiability, according to the better authorities. In *Ernst v. Steckman*, 74 Pa. St. 13, 15 Am. Rep. 542, the supreme court of Pennsylvania held that a note made payable twelve months after date, "or before if made out of" a certain described machine, was negotiable; and, in discussing the question, that learned court observed: "The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

This case is directly in point here. And the following cases are to the same effect: *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, 16 N. W. 64; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Stevens v. Blunt*, 7 Mass. 240; *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464; *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Capron v. Capron*, 44 Vt. 410. See, also, 1 *Daniel on Negotiable Instruments*, 4th ed., secs. 44, 45.

⁴⁸² No brief has been filed in this case in this court on the part of the respondents, and we have discussed the question of the defense of the statute of limitations solely because of the suggestion of counsel for appellant that that question was actually considered by the court below in passing upon the demurrer to the complaint. Upon no theory suggested by counsel can the judgment be sustained, and it is therefore reversed, and the cause remanded, with instructions to overrule the demurrer.

Reavis, C. J., and Mount, Fullerton and Dunbar, JJ., concur.

A Note is None the Less Negotiable because made payable on or before a named date: *Leader v. Plante*, 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415, and cases cited in the cross reference note thereto. A note made payable twelve months after date, "or before if made out

of the sale of'' a machine, is negotiable: *Ernst v. Stickman*, 74 Pa. St. 13, 15 Am. Rep. 542. See, also, *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297; *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 327, 60 Pac. 327; *Siegel etc. Co. v. Chicago etc. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417.

A *Negotiable Instrument* is not due until the expiration of the days of grace: *Edgar v. Greer*, 8 Iowa, 394, 74 Am. Dec. 316; and no action can be maintained thereon until the lapse of such time: *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220; *Estes v. Tower*, 102 Mass. 65, 3 Am. Rep. 439.

BEALL v. CITY OF SEATTLE.

[28 Wash. 593, 69 Pac. 12.]

MUNICIPAL CORPORATIONS—Notice to—What Sufficient.—

If an owner of premises applies to an assistant building inspector of a city for permission to place a steam boiler beneath the sidewalk, and is told the place where it is to be put, and given instructions as to the manner of placing it, the jury is justified in finding that the city, in the exercise of ordinary care, should have known where the boiler was placed, and the purpose for which it was so placed. (p. 896.)

HIGHWAYS.—A Traveler Upon a Public Highway Has a Right to Assume that it is safe for ordinary modes of travel. (p. 897.)

A MUNICIPAL CORPORATION is Answerable to a Traveler Injured on One of Its Public Streets, under its control, by the explosion of a steam boiler beneath the sidewalk over which he was walking, there erected and operated for three months, under conditions in violation of one of its ordinances. (p. 899.)

NEGLIGENCE—When Inferable from an Accident.—If a traveler upon the public streets of a city is injured by an unseen instrument exploding within the area of a street over which a city has control, a prima facie cause of action is established, and it devolves upon the city to show that it exercised reasonable care in order to overcome the presumption of negligence arising from the explosion. (p. 900.)

Shank & Smith, for the appellant.

W. E. Humphrey and Edward Von Tobel, for the respondent.

593 HADLEY, J. This action was brought by the appellant against the respondent to recover damages for personal injuries received from an explosion which occurred underneath the sidewalk on which the appellant was walking, **594** near the corner of Second avenue South and Washington street, in the city of Seattle. The complaint alleges that prior to March 21, 1899, the date of the accident, one Van der Van was the owner of

certain premises in Seattle, extending along Second avenue South, and also of a business block erected thereon; that with the knowledge and consent of respondent, the said owner utilized, in connection with the said building, the space underneath the sidewalk adjoining the said premises on the west side of Second avenue South, and placed immediately beneath the sidewalk, within the limits of said street, a certain hot water boiler and connections, constructed in such a manner as to carry steam; that, with the knowledge and consent of respondent, said apparatus was placed beneath the sidewalk in a negligent and unlawful manner, and without an inspection thereof; that respondent permitted the use of said space below the sidewalk in connection with said building without requiring the owner thereof to comply with the ordinances of the city of Seattle; that the sidewalk thus extended above said apparatus was open to the public as a highway for pedestrians, and was apparently in all ways safe for travel, there being nothing to indicate the presence of said boiler thereunder, and the plaintiff had no knowledge or warning thereof; that on the date aforesaid while the plaintiff was walking upon said sidewalk, the said boiler exploded with terrific force at the moment when the plaintiff was exactly above it, hurling the plaintiff into the air to a height of thirty feet, whence he fell with great force upon the hard, uneven surface of the ground; that the plaintiff was thereby seriously wounded and injured, and he therefore demands damages. The answer is a general denial. The cause came on for trial before a jury, and at the conclusion of the plaintiff's testimony the court granted ⁵⁹⁵ a motion for nonsuit. Plaintiff moved for a new trial, which was denied, and judgment was thereupon entered dismissing the action and taxing costs to the plaintiff. From said judgment plaintiff appeals.

It is assigned as error that the court took the case from the jury and entered judgment of nonsuit; also that the court erred in holding that notice to the assistant building inspector of the placing of the heating apparatus beneath the sidewalk was not notice to the city. The proofs show that the appellant, a commercial traveler who resides in St. Louis, was at the time of the explosion walking upon the sidewalk immediately over the location of said boiler. Two companions were with him, between whom appellant was walking. The force of the explosion seems to have centered at about the point where appellant and his companions were walking. The sidewalk was torn up, and destroyed, and appellant's companions received injuries from

which each died the same night. Appellant was covered with soot so that he was almost unrecognizable, was for the most part unconscious for two days, and received severe and probably permanent injury about the foot, besides a shock to his nervous system of a serious and damaging character. Under the evidence as introduced, it is manifest that appellant received injuries which were due to the explosion of the boiler under the sidewalk, and the question to be determined is, Was there evidence tending to show negligence on the part of the city, that should have been submitted to the jury?

The evidence shows that the owner of the premises adjoining the sidewalk under which the explosion occurred employed a carpenter to finish the uncompleted basement of his building, put an outside stairway thirty inches in width down from the sidewalk, and make certain other repairs in ⁵⁹⁶ the basement. Before commencing the work the carpenter applied to the secretary of the board of public works for a permit, and after stating the location of the premises as being within the fire limits, he was referred by the secretary to a Mr. Josenhans, the assistant building inspector. Mr. Thomson, the city engineer, and also chairman of the board of public works, testified that Josenhans was the assistant building inspector, and that applications for permits within the fire limits were referred by the secretary of the board of public works to either the inspector or assistant inspector of buildings. The permit to do the repair work was issued; and the carpenter, Mr. Hamilton, testified that when he applied for the permit he also made application for a permit to move out under the sidewalk the heating apparatus then located in the unfinished basement of the building. He further testified that, after he explained what he desired to do, the inspector told him he needed no permit to move the heating apparatus, and then directed him how to place the boiler in the proposed position under the sidewalk. Hamilton testified that he followed the directions of the inspector. The testimony shows that up to this time the basement was not only unfinished, but was simply a hole in the ground, filled with trash and rubbish, and that the space under the sidewalk was in the same condition. The outside of the sidewalk rested upon wooden blocks or piles, with a stringer running lengthwise of the walk, supporting wooden cross joists with planks above. Ordinance No. 2833 of the city of Seattle provides as follows:

"Section 22. Any person desirous of utilizing the under side of the sidewalks in front of any building owned by him shall

construct a sufficient stone or hard brick wall, not less than two feet thick, to be laid in one part cement and four parts sand, to retain the roadway of the street, ⁵⁹⁷ and shall extend the side, division or party walls of such building under the sidewalk to such curb wall. The sidewalks in all cases shall be of incombustible material entire, supported by walls or iron beams in accordance with the following schedule (here follow details for construction)."

It is manifest, under the evidence as it now stands, that the space under the sidewalk was being utilized without a compliance with the requirements of said ordinance. When the owner of this building sought to use the space under the sidewalk, it involved the alteration of the building by way of the extension of the side walls and otherwise as required by said ordinance. Being in the nature of an extension to the building, and for its use and benefit, the work therefore became, in effect, an alteration of the building itself. This alteration necessarily involved the use of the materials and the manner of construction for the extended side walls and the sidewalk and its supports required by the ordinance aforesaid, and an inspection of the work as it progressed or when completed might have disclosed the manner of construction, and the location of this boiler, with its attachments connecting it with the main building. Ordinance No. 2662 provides that the board of public works shall appoint a superintendent of buildings, bridges, and wharves. Among other duties designated for him, section 5 of said ordinance provides as follows: "It shall be the duty of the superintendent to visit each house, building, wharf or bridge which may be in the course of erection, construction or alteration within the limits of the city of Seattle and to see that said building, bridge or wharf is being erected, constructed or altered according to the provisions of the city ordinances; that the materials used are suitable for the purpose; that the structure is of sufficient strength and solidity to answer the purpose for which it is designed; that the foundation is down to the ⁵⁹⁸ required depth to get the best bearing that can be obtained, and if the nature of the soil requires piling, flagging or lagging, to see that it shall be done."

It is thus clearly made the duty of the superintendent to examine and inspect each building in course of erection or alteration. It is also provided that he shall keep a record of all permits issued. The permit issued in this instance specifically authorized the construction of a stairway thirty inches wide down from the sidewalk to the basement, and the application

not only disclosed that it was the intention to use at least a portion of the space under the sidewalk for the stairway purposes, but the permit actually authorized it. In any view of the matter, it would therefore appear that the city had actual notice that some alterations were being made under that sidewalk as an attachment to, and for the benefit of, that building, and that actual consent to make the alterations to the extent required for stairway purposes was given. We do not think it can be said, as a matter of law, that a proper inspection of that completed work, as required by the ordinances of the city, would not have led to the discovery of the entire situation there, including the location of the boiler and its attachments. We think it is at least a question for the jury to determine whether, with the exercise of reasonable care under the circumstances, the city should have known that this boiler was there located, and the purposes for which it was so placed. Moreover, as we have seen, Mr. Thomson, chairman of the board of public works, testified that Josenhans, the assistant building inspector, was a proper official to whom should be referred the matter of permits for building alterations within the fire limits; and Hamilton, the carpenter, testified that he not only told Josenhans that he intended to place the boiler under the 599 sidewalk, but actually received instructions from him as to the manner of placing it. We think, under the evidence as it now stands, that Josenhans occupied such a position in the premises as made notice to him notice to the city. Whatever notice was involved in the conversation between him and Hamilton related to something that was yet to be done, and not to what had been done, and it is urged that it could not be notice that the thing was actually done. Strictly speaking, it probably cannot be said to have been notice of the thing actually accomplished; but, being an expression of intention to do a thing, we think it was such notice as at least emphasized the duty of an inspection to discover what was really done, and it is for the jury to say whether that duty was neglected. If no inspection was ever made of the premises after the receipt of notice of intention to place this boiler under the sidewalk as an attachment to the building, then, without other testimony, the jury would be justified in finding that no objection was made by the city, and that it consented thereto. There is testimony in the record to the effect that no inspection of the premises was ever made by any city official either during the progress of the work or after its completion. The work of placing the boiler and making the alterations was

done in December, 1898, and the explosion occurred in March, 1899. Under all the circumstances, we think it cannot be said, as a matter of law, that the city had no notice of the existing conditions; and, for further purposes of this opinion in the consideration of the motion for nonsuit, it must be held that there was sufficient evidence to go to the jury upon that subject.

With knowledge of the conditions brought home to the city, what is the status of the case, without further testimony? It is a well-settled principle that a traveler upon a "public highway has a right to assume that it is safe for ordinary modes of travel. This principle is well stated in Williams on Municipal Liability for Tort, section 128, as follows: "In the absence of anything that would suggest to the mind of a man of ordinary prudence a peril of travel, a person who is passing along a public highway is not bound to anticipate danger, but has a right to assume that the municipal authorities have made the way reasonably safe for public travel in the ordinary modes. And he may indulge in this assumption as well when he is traveling in the night-time as when he is traveling by daylight. 'A person may walk or drive in the darkness of the night,' says Chief Justice Hunt in *Davenport v. Ruekman*, 37 N. Y. 568, 573, 'relying upon the belief that the corporation has performed its duty and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages.'"

Applying the above rule to the case at bar, we find, as the evidence stands, that the appellant was walking upon a public highway of the respondent city, entirely unconscious of any present danger, when he was instantly subjected to great danger by a violent explosion from a source concealed immediately under the highway upon which he walked.

In *Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795, a lot owner had made a dangerous cellarway under a sidewalk and street in front of his house, which he covered with a trap door. It remained in that condition for about two months, when a person traveling over the sidewalk stepped upon the trap door, which broke down and precipitated him into the excavation below, causing severe personal injuries. It was held that the city could not relieve itself from responsibility because the dangerous opening⁶⁰¹ was made by a lot owner, and, further, that it was the duty of the city authorities to supervise the work of covering the cellarway, and to cause the use of suitable precautions to prevent accidents. Under similar circumstances, it was

held in *Morris v. Woodburn*, 57 Ohio St. 330, 48 N. E. 1097, that the injured party may elect to sue either the party creating the nuisance, or the city for its tort in failing to discharge a duty imposed by law.

This court said in *Saylor v. Montesano*, 11 Wash. 328, 333. 39 Pac. 653: "That this particular portion of the street was not in a safe condition was demonstrated by what actually happened thereon. Respondent not only had a right to drive over any portion of the street, but a right to expect that all portions of it were in a safe condition for ordinary use."

In *Hume v. Mayor*, 74 N. Y. 264, injuries had been received from a wooden awning constructed in the street. The court, at pages 274, 275, of the opinion, said: "Regarding then the ordinance referred to as still in force as is claimed by the defendant, it appears that it required that the erection should be made under the direction of the street commissioner. If under the direction of that officer, or through his neglect to supervise it, it was constructed in a negligent and insecure manner, and injury to an individual ensued, the city would be liable for such negligence (*Wendell v. City of Troy*, 39 Barb. 337, and S. C., 4 Keyes, 261), and this liability would exist even if the defect were not patent. If the erection was made without authority from the city and without the approval or direction of the street commissioner, then it was unlawful erection in the public streets by an individual for his private purposes, which the jury have found to be obviously unsafe and dangerous to persons using the street, and which it was the duty of the officers ⁶⁰² of the city to cause to be removed, after having actual or implied notice of its existence."

In *Chicago v. Robbins*, 2 Black, 418, 422, Mr. Justice Davis says: "It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained."

In *Wells v. Brooklyn*, 9 App. Div. 61, 41 N. Y. Supp. 143, a showcase was maintained on a sidewalk without permission of the municipal authorities; and the city was held liable for injuries caused by its fall, though it had been securely fastened until the day before the accident, when a truck collided with it and broke it loose. The contention was made in behalf of the city that an essential element of its liability was

that the obstruction should have been actually dangerous in the first instance, or manifestly likely to become so, in the judgment of prudent men, and that, if originally it was neither, the fact that it subsequently developed into a menace to public travel did not render the municipality chargeable with negligence for the resulting injury. Upon this subject the learned writer of the opinion says at page 145: "I think this is too limited a view of the rule of law applicable to such a case, both upon reason and authority. When a municipality tolerates for years the continuance of an unlawful obstruction in a public street, which it is in duty bound to remove therefrom, its action is distinctly wrongful. It must bear the natural consequences of that wrongful action. Any unlawful obstruction in a public highway may prove dangerous to travelers, either from the manner in which it is originally erected, or by reason of accidental or other interference with it by strangers to its ⁶⁰³ erection. Notice to the municipality, therefore, of its presence, is notice that the safety of public travel is endangered, or liable to be endangered. If, under such circumstances, the obstruction is allowed to remain, the municipality takes the risk. If injury ensues, the presence of the obstruction is to be deemed the proximate cause thereof, for the injury could not have happened if the municipal authorities had performed their duty. In that event, in the case at bar, the showcase would not have been on Grand street at all, and could not have been loosened by the collision with the truck, or fallen upon the plaintiff."

In the case at bar, as we have seen, this boiler was being maintained as an attachment to a building, but located within the limits of a public street, under conditions which were in violation of a city ordinance. If the extended sidewalks, the supporting stone or brick wall laid in cement, and the stronger overhead structure, had been constructed, as required by the ordinance, at places where the space beneath the sidewalk is used, who can say that appellant would have been injured? The defect in the boiler, if there was a defect in the beginning, may not have been patent; but, under the evidence as it now stands, the boiler was maintained and operated there for a period of three months under unlawful conditions. It may therefore have been a nuisance which it was the duty of the city to abate, whether there was any apparent defect in the structure of the boiler or not.

Appellant was injured by an unseen instrument exploding within the area of the street over which the city had control. We think, when he had shown those facts that a prima facie case of negligence was established, and that it devolves upon the city to show that it exercised reasonable care in the premises, in order to overcome the presumption of negligence arising from the fact of the explosion. An ⁶⁰⁴ explosion being a thing so unforeseen and unexpected in its nature, it is held that negligence will be presumed, if unexplained. There is some conflict in authority upon this subject but we believe the better reasoning and the weight of authority support the above statement of the law. Some distinction has been made between cases where contractual relations exist between the parties, and those where there is no such relation, it being held that, when such relation exists, proof of the explosion carries with it the presumption of negligence, and makes a prima facie case, when such would not be true if the contractual relation did not exist. We think the better reasoning is with those cases which hold that the presumption arises not only in favor of those sustaining contractual ties, but in favor of all others as well. The duty to exercise reasonable care in the maintenance and operation of instrumentalities and devices liable to explosion runs to all mankind. In support of this view, see the following cases: *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020; *Warn v. Davis Oil Co.*, 61 Fed. 631; *Rose v. Stephens etc. Transp. Co.*, 11 Fed. 438; *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Posey v. Scoville*, 10 Fed. 140; *Robinson v. New York Central etc. R. R. Co.*, 20 Blatchf. 338, 9 Fed. 877; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991.

For the reasons hereinbefore assigned, we think there was such evidence as should have been submitted to the jury, and we therefore believe the court erred in granting the motion for nonsuit. The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

Reavis, C. J., and Fullerton, Anders, Dunbar, Mount and White, JJ., concur.

A Municipal Corporation is under an absolute duty to keep its streets in a reasonably safe condition: *Deming v. Terminal Ry.*, 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; *Russell v. Town of Monroe*, 116 N. C. 720, 47 Am. St. Rep. 823, 21 S. E. 550; monographic note to *Goddard v. Harpswell*, 39 Am. St. Rep. 385-390; *Roanoke v. Shull*, 97

Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. It is not an insurer, however, against injury to travelers: Nesbitt v. Greenville, 69 Miss. 22, 30 Am. St. Rep. 521, 10 South. 452; Spillane v. Fitchburg, 177 Mass. 87, 83 Am. St. Rep. 262, 58 N. E. 176. A city is not liable for injuries sustained from defective streets, without notice, express or implied, of their condition. The law imputes notice, however, from the existence of the defect for such a length of time that it might, with reasonable diligence on the part of the authorities, have been known: Duncan v. Philadelphia, 173 Pa. St. 550, 51 Am. St. Rep. 780, 34 Atl. 235; Lorence v. Allensburgh, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; Frankfort v. Coleman, 19 Ind. App. 368, 65 Am. St. Rep. 412, 49 N. E. 474; Baustain v. Young, 162 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921. The fact that a city has granted a permit to make a dangerous excavation in a street is notice that the work is in progress, and charges it with the duty of seeing that it is properly conducted: Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 33 Pac. 273.

TOWN OF TUMWATER v. HARDT.

[28 Wash. 684, 69 Pac. 378.]

AN OFFICIAL BOND Containing the Signatures of the Principal and Sureties in a Justification, and Nowhere Else, properly delivered and accepted, is valid and enforceable. (p. 902.)

J. W. Robinson, for the appellant.

Charles D. King, for the respondent.

685 Per CURIAM. Action by respondent, a municipal corporation of the fourth class, against the town treasurer and sureties upon his official bond. Under instructions of the court, a verdict was returned in favor of respondent. From an examination of the record and statement of facts, we are satisfied that only one legal question is necessary for examination here. The official bond contained the signatures of the treasurer and his sureties in the justification to the bond, and was signed nowhere else. The paper was a printed official bond, with the conditions written therein, and the names of the treasurer and his sureties written in the body of the bond; but the names of the treasurer and the sureties were not signed at the end of the stipulations and conditions, where blank lines were left for such signatures. But on the same paper, and in continuous order, following the blanks for names, was the justification for the usual official bond. At the end of the justification were the signatures of the treasurer and his two sureties, affixed in the handwriting of each, and subscribed

and sworn to before the town clerk; and immediately following was the official oath of the treasurer, subscribed and sworn to by him before the town clerk. It is urged by counsel ⁶⁸⁶ for appellant that the bond was not signed by the sureties or principal; that the justification was no part of the bond, and had no relation to it; therefore, that plaintiff's cause of action failed, and judgment should have been entered for defendants. Section 998 of Ballinger's Code provides, relating to such bonds: "All the provisions of any law of this state relating to the official bonds of officers shall apply to such bonds, except as herein otherwise provided."

Section 1526 of Ballinger's Code prescribes that, unless otherwise especially provided, there shall be at least two sureties upon the official bond of every officer. Section 1527 provides for the justification of the sureties upon the bonds of other officers. Thus, it may be observed that the signatures to the justification were authorized by law and a doubt cannot be entertained that the defendants executed the bond intentionally. The position of the justification and their signatures conclusively establishes the execution of the paper. We are satisfied from the evidence that the bond was properly delivered and accepted by the plaintiff, and the liberal provisions of our statute prescribing the effect of an official bond confirm the efficiency of the bond before us.

The case of Yakima Water etc. Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471, is in point here. In that case an appeal bond to this court was attacked because the sureties had only affixed their names to the justification on the bond, and had not signed the paper in any other place. It was held that the signatures to the justification, where the names appeared in the body of the instrument, were sufficient, and the bond was valid.

The conclusion that the bond in suit is valid must affirm the judgment.

Official Bonds.--The defective execution of official bonds, in the matter of the signatures of the parties, as affecting the validity of the instruments, is considered in the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 192-197.

BANK v. DOHERTY.

[29 Wash. 233, 69 Pac. 732.]

MORTGAGE, When Cannot be Foreclosed for Nonpayment of Interest.—A mortgage taken to secure a promissory note payable three years after date, with interest as therein stated, payable monthly, cannot be foreclosed until the principal is due, if the condition of the note is that the mortgagor shall on or before maturity pay the note with the interest that may be due thereon. (p. 905.)

MORTGAGE—Stipulation for Attorneys' Fee, When Does not Affect the Time for Foreclosure.—A stipulation in a mortgage that if the mortgagor fails to pay the note with interest, or any part thereof, a suit shall be commenced and attorneys' fees shall be allowed, does not entitle the mortgagee to commence suit to foreclose for the nonpayment of interest, the principal not being due. This stipulation is not intended to affect the other provisions of the mortgage, but merely to provide for the attorneys' fee when the right to foreclose accrues and is exercised. (p. 906.)

MORTGAGE—Foreclosure for Interest, When Right of is not Given by Statute.—A statute providing that whenever the complaint is filed to foreclose a mortgage upon which there should be due any interest or installment of principal, or there are installments not due, the defendant may pay into court the principal and interest due with costs, and proceedings shall then be stayed, does not authorize the foreclosure of a mortgage before the principal becomes due, where such foreclosure is not authorized by the terms of the mortgage itself. (p. 907.)

Suit to foreclose a mortgage. The terms of the section of the code of Washington referred to in the opinion are sufficiently stated in the third subdivision of the syllabus. Judgment for the plaintiff, the defendant appealed.

Roberts & Leehy, for the appellants.

Preston, Carr & Gilman and James B. Murphy, for the respondent.

234 MOUNT, J. Action to foreclose a mortgage on account of unpaid installments of interest. As we view this case, there is but one question necessary to be discussed, viz., Can this action be maintained before the maturity of the principal note? The note is as follows:

"\$2,500.00. Butte, Montana, January 3, 1900.

"For value received, three years after date I promise to pay to B. Bank or order the sum of twenty-five hundred dollars (\$2,500), at his office, in Butte, Montana, with interest at the rate of two per cent per month, payable monthly. The

privilege hereby granted to the maker of this note to pay any amount not exceeding two hundred dollars (\$200) per month thereon, interest to be reduced according to such payments. Payments to be made on interest day.

“MARY T. DOHERTY.”

At the same time and place the maker of the note executed and delivered to the payee a mortgage which recited that the same was given “to secure the payment for a certain promissory note bearing equal date herewith.” The mortgage provided as follows: “Now, if the said first party shall on or before maturity pay, or cause to be paid, the said note, with interest that may be due thereon, then the foregoing conveyance shall be null and void, otherwise to be and remain in full force and virtue; but should the said first party, from any cause, fail or refuse to pay said note, with interest, or any part thereof, when due, and suit be commenced to foreclose this mortgage, then the said second party may and shall have and recover from the said first party a reasonable attorney’s fee; the amount of such fee to be ²³⁵ fixed and allowed by the court before whom such suit is brought, and taxed and collected as other costs.”

It is stated as a general rule that a mortgage cannot be foreclosed before it is due, or there is a breach of some condition: 2 Jones on Mortgages, 5th ed., sec. 1174; Wiltsie on Mortgage Foreclosure, sec. 34.

And also: “If the mortgage contains an absolute covenant that the principal shall not be called in during a specific period, or until the happening of a certain event, then no default in the payment of the interest in the meantime will enable the mortgagee to sue”: 2 Jones on Mortgages, 5th ed., sec. 1178.

“But it would seem that in the absence of a stipulation giving the power, there can be no foreclosure of a mortgage given as security for the payment of a promissory note and the interest thereon until the principal sum becomes due. . . . The interest falling due yearly, or at other stated periods, on a note secured by mortgage, is an installment of the debt, and . . . the mortgage may be foreclosed to enforce its payment, because the mortgage must have been given to secure the interest as well as the principal, and the law will not withhold a remedy until the period elapses for the maturity of the whole debt. And where a condition is inserted in the mortgage which authorizes a sale to be made upon the happening of any default, the failure to pay interest when it is due is a default within the

meaning of such a clause, and will entitle the mortgagee to foreclose": *Wiltie on Mortgage Foreclosure*, sec. 42.

Conceding the foregoing general rules to be the law applicable to the case in hand, and conceding the facts to be that interest payments had not been made monthly, it requires a consideration of the mortgage to determine whether a default in an interest payment is a breach thereof. The note clearly provides that the maker shall have until January 3, 1903, to pay the principal sum, ²³⁶ and that interest shall be payable monthly. It was within the power of the parties to have made the mortgage security for the whole or any part of the note, or for the note and interest, or either. It was also within their power to have provided in the mortgage that upon failure to pay the note or the interest, or either, foreclosure proceedings may be had. Or, as is usual in such cases, the mortgage might have contained a provision that foreclosure proceedings should be had "upon failure to perform any of the conditions," or "upon failure to pay the note according to its tenor and effect," or "when payments become severally due," etc. A breach of any such condition would have subjected the mortgage to foreclosure. But we find the provision in this mortgage as follows: "Now, if the said first party shall, on or before maturity, pay or cause to be paid the said note, with interest that may be due thereon, then the foregoing conveyance shall be null and void; otherwise to be and remain in full force and virtue."

In other words, if the first party at maturity fails to pay the said note, with interest that may be due thereon, then the foregoing conveyance shall be in full force and virtue. It seems clear that this is an express provision that the debt was permitted to run until the expiration of three years from the date of the note and mortgage, and that the mortgage should stand as security for the principal, with whatever interest should be allowed to accumulate thereon, and should not be foreclosed unless there was a failure to pay the note at maturity. There is no other provision in the mortgage from which any other intention can be inferred, except it be the following: "But should the said first party, from any cause, fail or refuse to pay said note, with interest, or any part thereof, when due, and suit be commenced to foreclose this ²³⁷ mortgage, then the said second party may and shall have and recover from the said first party a reasonable attorney's fee, the amount of such fee to be fixed and allowed by the court before whom such suit is brought, and taxed and collected as other costs."

It will be seen at once that this provision was intended solely as a provision for attorney's fees in case suit was brought to foreclose the mortgage. The language of this provision must be given its natural and ordinary meaning. The parties must be presumed to have meant what they said. But assuming that the language was used as the recitation of a right under the mortgage, and giving it all the force of such recitation, we still do not see that it changes the defeasance provision preceding. The language is: "But should the said first party, from any cause, fail or refuse to pay said note, with the interest, or any part thereof, when due, and suit be commenced." The words "or any part thereof" certainly refer to and mean the note. If these words were intended to refer to the interest when due, and not to the note when due, or to both the interest when due and the note when due, that idea could, and, no doubt, would have been, expressed, as is usual in such cases by the use of the word "or" instead of the word "with," so that, if the parties had intended that the mortgage might be foreclosed by reason of failure to pay interest when due, the clause would have been made to read, "But should the first party, from any cause, fail or refuse to pay said note, or the interest, or any part thereof, when due." Such language would have made the idea clear, but, not having been used, we cannot assume that the parties intended to use it. We are therefore of the opinion that the latter provision does not, and was not intended to, modify the former provision so as to give a right of foreclosure for nonpayment of interest. ²³⁸ There is no dispute that the mortgage in question is security for both principal and unpaid interest, nor that the interest is payable monthly, and is a part of the debt. But where the parties have expressly agreed that the maker of the mortgage shall have until the maturity of the note to pay the note, with interest, the fact that partial payments of interest may become delinquent in the meantime does not give the right to foreclose the mortgage, where there is no breach of any condition named in the mortgage. From a careful consideration of both the note and mortgage, we are convinced that it was the intention of the parties that the mortgage should mature only upon maturity of the principal note, and that foreclosure proceedings cannot be had until maturity of the note, notwithstanding interest payments may be in default. Section 5894 of Ballinger's Code has reference to foreclosure of a mortgage upon which there may be due any interest or installments of interest for

which foreclosure may be had. It does not make a mortgage subject to foreclosure which by its terms is not subject to be foreclosed. The cause was therefore prematurely brought. It will be reversed and remanded, with instructions to sustain the demurrer and dismiss the action.

Reavis, C. J., and White, Anders, Hadley, Fullerton, and Dunbar, JJ., concur.

If a Mortgage provides that the note secured thereby shall become due and payable thirty days after default in the payment of interest, the mortgagee has a right, upon the expiration of thirty days from such default, to proceed to foreclose his mortgage: *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, 61 N. W. 431; *Hawes v. Detroit etc. Ins. Co.*, 109 Mich. 324, 63 Am. St. Rep. 581, 67 N. W. 329. See, too, *Glas v. Glas*, 114 Cal. 566, 55 Am. St. Rep. 90, 46 Pac. 667.

SEATTLE AND MONTANA RAILROAD COMPANY v. BELLINGHAM BAY AND EASTERN RAILROAD COMPANY.

[29 Wash. 491, 69 Pac. 1107.]

CERTIORARI—Judicial Acts, What are.—Whenever an act determines a question of right, or of obligation, or of property, as the foundation upon which it proceeds, such act is to that extent judicial. (p. 910.)

CERTIORARI may Issue from the Supreme Court to review an adjudication of a subordinate court on the question of a public use or necessity in a proceeding under the eminent domain act, where the statute does not authorize an appeal in such a proceeding, except for the purpose of questioning the propriety and justness of the damages, and the constitution of the state gives the supreme court appellate jurisdiction in all actions and proceedings other than those wherein the amount in controversy, or the value of the property, does not exceed two hundred dollars and power to issue writs of certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. (p. 911.)

APPELLATE PROCEEDINGS, Power of the Legislature to Deny.—When the supreme court is by the constitution vested with appellate jurisdiction, the legislature cannot impair or destroy it as to any specific case by the failure to provide therefor, and such court may, in such case, bring the proceedings before it for review by issuing a writ of certiorari. (p. 911.)

EMINENT DOMAIN—Right of One Railroad to Condemn the Right of Way of Another.—Under a statute authorizing a railway corporation to appropriate all land, real estate, and other property necessary for the construction of its road, one railway corporation may acquire a right to use such part of the right of way of another

as is not necessary for the exercise of the corporate franchise of the latter, as where the tracks of both roads may be constructed, maintained, and operated practically and with reasonable safety after appropriating part of the right of way of the one for the use of the other. (pp. 914, 916.)

Kerr & McCord, for the petitioner.

Dorr & Hadley, for the respondent.

492 REAVIS, C. J. The Bellingham Bay and Eastern Railroad Company, respondent, brought an action in the superior court of Whatcom county to condemn for its use as a right of way certain real property owned by the Seattle and Montana Railroad Company, the petitioner, at Fairhaven. Upon the trial of the action it was adjudged that the right of way described in the petition and sought to be appropriated was necessary for the respondent railway company, and the intended use thereof a public one, and that the public interests required the appropriation thereof, and an order was entered directing that a jury be impaneled to assess the damages for the taking of petitioner's property. Petitioner excepted, and in this proceeding prays a review of the adjudication that the property sought to be condemned can be taken for this use, or that it is for a public use and required by the public interest, and denies the power to appropriate the property of the petitioner, because, as alleged, it is already appropriated by petitioner for a public use; that is, the construction and operation of its own railway. After finding the preliminary facts of notice, hearing, and that each, petitioner and respondent, is a railway company operating lines of railroad between Fairhaven and other points, and that each is authorized to own and condemn real property for such uses, the other material facts in issue are set forth as follows:

"12. That the respondent [here petitioner], Seattle and Montana Railroad Company, is the owner of the land sought to be appropriated and that the same are embraced within a tract of land one hundred feet in width owned by said **493** Seattle and Montana Railroad Company and claimed by it as right of way for its railroad; which said one hundred foot strip of land has been acquired by said Seattle and Montana Railroad Company by purchase for railway purposes, but has never been condemned for such purposes.

"13. That the respondent [here petitioner] Seattle and Montana Railroad Company requires for the operation of its railway line and system over and across said one hundred foot strip

and alleged right of way, one main track, a passing track and two storage tracks and no more, making four tracks in all, and that none of said land sought to be appropriated by petitioner, Bellingham Bay and Eastern Railroad Company, is necessary or required for the use of the respondent Seattle and Montana Railroad Company, in the operation of its railroad, and that the taking and appropriating thereof by said petitioner will not interfere with the operation of said four tracks of said respondent Seattle and Montana Railroad Company, nor with the operation of its said railway system in any manner or at all.

"14. That in the construction and for the necessary operation and maintenance of said line of railroad of said petitioner [here respondent], it is necessary for it to have each and every part and parcel of said above-described tract of land for such right of way for the uses and purposes of its railway over and across said lands, real estate, and premises as hereinbefore described.

"15. That the contemplated use for which the said land, real estate and premises are sought to be appropriated is really a public use, and that the public interest requires the prosecution of the enterprise being prosecuted by petitioner and requires the appropriation of said lands as prayed for in said petition, and that the said land, real estate, and premises so sought to be appropriated are required and necessary for the purposes of such enterprise."

Petitioner excepted to the findings of fact numbered here, and the evidence is before us by stipulation. Respondent, the Bellingham Bay and Eastern Railroad Company, demurs to the petition for the writ, and, in objecting ⁴⁹⁴ thereto, alleges want of jurisdiction in this court to issue the writ, and because the application does not state facts sufficient to state a cause of action.

1. The demurrer will first be considered. Our constitution, article 1, section 16, declares: "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit

from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

"Whenever an act determines a question of right or obligation, or of property as the foundation upon which it proceeds such an act is to that extent judicial": *Wulzen v. Board of Supervisors*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; *Sinking Fund Cases*, 99 U. S. 761.

The jurisdiction of this court is clearly defined in article 4, section 4 of the constitution, as follows: "The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, ⁴⁹⁵ or the value of the property, does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof."

It has appellate jurisdiction in all actions and proceedings except in civil actions at law for the recovery of money or personal property, where the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars. It may also issue all writs necessary to its appellate and revisory power. But it is urged that the court, in *Seattle etc. Ry. Co. v. State*, 5 Wash. 807, 32 Pac. 744, denied the power to issue the writ of certiorari to review the adjudication of the question of public use and necessity in the superior court. It may be observed that the court there did not consider

the nature of the appeal act in eminent domain cases, and the writ was denied because a remedy was assumed to exist in appeal. However, later, in the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, it is decided that the only question which can be reviewed on appeal under the special statute for that purpose is the "propriety and justness of the damages"; and the following language found in *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158: "But we do not see any particular merit in this contention, for questions which the law submits to the exclusive jurisdiction of the superior courts may be ⁴⁹⁶ as purely judicial questions as though they were tried in this court"—can only apply to the exception which the constitution declares to the appellate jurisdiction of this court. The legislature can make no exception. It may fail to provide the procedure for appeal in a special case, but the power of constitutional review still remains in this court. In *Browne v. Gear*, 21 Wash. 147, 57 Pac. 359, we defined the power of the superior court and the functions of the writ of certiorari under the statute. The writ was issued in *State v. Moore*, 23 Wash. 276, 62 Pac. 769. In *State v. Superior Court*, 26 Wash. 278, 66 Pac. 385, the writ was issued where appeal was inadequate, and the revisory power of this court was exercised in reviewing and correcting an order of the superior court. It having been adjudged that no review on appeal of the question of public use and interest involved in the exercise of eminent domain proceedings now exists, it follows the writ of certiorari may be issued to bring up the record for review in the proceedings for appropriation of the right of way through petitioner's real property; the application for the writ states sufficient cause for its issuance.

2. The real property through which the right of way is sought to be appropriated was purchased by petitioner eleven years ago, and is parcels included in a larger tract of tide lands purchased at the same time by the petitioner. Other portions of such land so purchased have been granted by petitioner to various parties, who have erected thereon improvements such as foundries and canneries. All the property lies within the city limits of Fairhaven. Petitioner has reserved one hundred feet for its right of way. There are two railroad tracks which are spurs in operation by petitioner upon this one hundred feet. The strip of land sought to be condemned is twenty-eight feet ⁴⁹⁷ taken off one side of the one hundred feet for a distance of several hundred feet in length. The respondent's

road enters the town across the water and tide lots, and seeks to go to its terminal grounds by a line that diagonally crosses the tracks and right of way belonging to petitioner, also situated on tide land lots. It then seeks to continue on its proposed right of way of twenty-eight feet for several hundred feet parallel to the tracks of petitioner to its terminal grounds. It is maintained by counsel for petitioner that, where one railroad has appropriated real property for its uses, another railroad company cannot longitudinally appropriate a part of the right of way for the same uses, and the point is urged that property once appropriated to a public use cannot be condemned for another public use without express legislative authority. It is further asserted there is no such express authority from the legislature; and section 5647 of Ballinger's Code is referred to as containing an express provision for appropriation of a longitudinal section of existing right of way through canyons, passes, and defiles, and it is inferred therefrom that such provision is exclusive, and no other appropriation of such right of way than expressed in the statute can be implied. The question is, Does the section mentioned intend such rights of condemnation as is granted in the general statute of eminent domain? The right is expressed in the authority for judgment as follows: "And at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad company to occupy and use said right of way, roadbed, and track, if necessary, in common with the railroad company or companies already occupying the same, and defining the terms and conditions upon which the same shall be so occupied and used in common."

498 The purpose of this enactment is to prevent any railroad from occupying its own tracks exclusively where the physical conditions are such that another railway cannot be operated through such place, and the statute contemplates, if necessary, a common easement over the same land and tracks. The section is a part of the general statute relating to eminent domain. Sections 5637 to 5643, inclusive, of Ballinger's Code prescribe the procedure for condemnation of right of way by railroad companies. The court in such proceedings must, from competent proof, adjudge that the contemplated use of the land sought to be appropriated is a public use, and that the public interests require the prosecution of the enterprise. Perhaps the strongest authority in support of the position urged by peti-

tioner is the case of *Illinois Cent. R. R. Co. v. Chicago etc. R. R. Co.*, 122 Ill. 473, 13 N. E. 140. In that case an endeavor was made by the petitioner to condemn a part of the right of way along the Mississippi river bottom belonging to another railroad company. The way had been acquired partly through a grant by Congress, and the remainder by condemnation under the state statutes. The general statute of Illinois authorized a railroad company to appropriate absolutely "a stream of water, watercourse, street, highway, plank road, turnpike, road or canal." The court held that the legislature having undertaken to prescribe what particular public properties might be appropriated, the rule, "*Expressio unius exclusio alterius*," was applicable. Our statute is general, and authorizes the appropriation of "all land, real estate, or other property" necessary for the construction of the railroad. It also appears in the Illinois case that the right of way sought to be condemned was acquired by the railroad occupying it through legislative grant and by condemnation. In some of the authorities cited by 499 counsel for petitioner the language used seems to justify the position urged by counsel, that a right of way owned by one railroad company cannot, without express legislative authority, be condemned for another public use of the same nature. Among them are *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345; *Baltimore etc. Ry. Co. v. Board of Commrs.*, 156 Ind. 260, 58 N. E. 837, 839; *State v. Paterson*, 61 N. J. L. 408, 39 Atl. 680. It may be observed that in some of these cases the claim made by the appropriator was for the condemnation of railroad tracks in operation, or for depot grounds already occupied, and the use sought by the condemnation was inconsistent with the operation of the railroad company already owning the property. But the general rule maintained by the petitioner, and the authorities supporting the same, is not so applied as to prevent one railroad from taking the property which is not in use for railroad purposes, and not necessary for the corporate franchises: *Lewis on Eminent Domain*, 2d ed., sec. 267a, and authorities cited. The following rule stated in the text by the same author (section 267b) seems to be well supported by the authorities referred to therein:

"It is manifest, however, that even a railroad company which is organized under a general law may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built, and the topography or other conditions

are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company, or incurring ruinous, or greatly increased expense. The same necessity may arise in mountainous countries, or else the first company might preclude all others from ⁵⁰⁰ reaching certain localities. But this implied authority only extends to the taking of so much of the right of way of the first company as can be spared without material detriment. The question is, 'whether the new condemnation can be made without destroying the use and usefulness of that part of the first acquired right of way which is in actual use, or so obstructing or hindering or embarrassing it as to render it unsafe.' Just what the degree of necessity must be to justify the taking it is difficult to say. One company cannot take part of the right of way of another merely because it is more convenient. It is largely a question of practicability and expense, of comparative advantage and injury, having regard always to the interests of the public, for whose benefit the general authority is given and the particular taking proposed."

3. In the present instance it appears that about eleven years ago petitioner acquired by purchase a considerable area of tide lands in front of the city of Fairhaven. This quantity of tide lands was evidently not all acquired for its corporate purposes and uses. Subsequently it has sold for private purposes several parcels, and still owns several parcels not in use for railroad purposes. Its reservation of the one hundred feet for right of way has not yet been used, with the exception of the two spurs for trackage purposes extending from its station. The proofs offered by the petitioner tended to show a contemplated use for at least four tracks, and that the same were intended to be constructed immediately. The proofs at the hearing also tended to show that thirty feet was sufficient for the operation of two tracks, or sixty feet for the four proposed tracks. Respondent seeks to acquire twenty-eight feet for two tracks. There is testimony tending to show that the operation of trains by the two railroad companies, if respondent is given the appropriation sought, is practicable, and, with care and some increased cost, is reasonably safe. ⁵⁰¹ It was observed in *Mobile etc. R. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 507, 6 South. 404: "As a general proposition, it may be said, that railroad companies, organized under the general laws, are authorized by the statutes to acquire by condemnation the right

of way of another corporation, when essential to the accomplishment of their principal purposes, or when there is space for the tracks of parallel roads without obstructing the use of the same. The statutes have been so construed, and to that construction we adhere: *Armiston etc. R. R. Co. v. Jacksonville etc. R. R. Co.*, 82 Ala. 297, 2 South. 710; *East etc. R. R. Co. v. East Tennessee etc. R. R. Co.*, 75 Ala. 275."

The principle is stated in *Matter of City of Buffalo*, 68 N. Y. 167: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference, which may be compensated by damages paid; if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms."

The following authorities are pertinent: *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.*, 35 Mich. 265, 24 Am. Rep. 545; *Colorado etc. Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293; *Baltimore etc. Ry. Co. v. Board of Commrs.*, 156 Ind. 260, 58 502 N. E. 837; *Northwestern Teleph. Exch. Co. v. Chicago etc. Ry. Co.*, 76 Minn. 334, 79 N. W. 317. The necessity must always be shown when one railroad attempts to appropriate the property of another. This necessity was found by the court. This principle is stated in *Mobile etc. R. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 507, 6 South. 404, as follows: "A necessity, such as authorizes one railroad corporation to condemn a part of the right of way of another does not mean an absolute and unconditional necessity as determined by physical causes but a reasonable necessity under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other; and the right of condemnation is not made out, unless the petitioning company shows that the cost of acquiring and constructing its road on

any other route clearly outweighs the consequent damage which may result to the older company, not including the question of competition for the business of a manufacturing (or other large) establishment on the line of the proposed route."

From the review on the merits, as it appears from the record before us, we conclude that no rule of law affecting the rights of petitioner has been violated to its prejudice. Relative to the facts found by the superior court, an examination of the bill of exceptions shows that competent proof was made of all the facts necessary to be found, and there is no such preponderance of proof against the findings as to set them aside. The order of the superior court is therefore affirmed.

Anders, Mount, Dunbar, White, and Hadley, JJ., concur.

Part of the Right of Way of a Railroad company may be condemned for a telegraph line or for another railroad: See *Postal Tel. etc. Co. v. Oregon etc. R. R. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 137-147.

Questions Reviewable on Certiorari are considered in the monographic note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29-46.

IN RE BELT'S ESTATE.

[29 Wash. 535, 70 Pac. 74.]

TRUST FUNDS do not, on the Death of the Trustee by Whom They Were Held, become liable for the debts of his estate, nor is the relation of the cestui que trust thereto changed. (p. 919.)

AN ADMINISTRATOR of a Trustee is Entitled to the Possession of the Trust Funds, and may commence an action therefor in his individual or representative capacity. (p. 919.)

EXECUTORS and Administrators.—An Inventory is not Conclusive as to the ownership of the property, either as against third persons or the executor or administrator. (p. 920.)

PROBATE COURT, Jurisdiction of, to Determine the Title to Property.—On an application to compel an administrator to inventory and have appraised certain property, the court of probate has jurisdiction to determine whether it belongs to the estate or the estate has any interest therein or reasonable claim thereto. Such determination is not binding on any person afterward claiming the property in another forum, but is only for the purpose of determining whether the administrator shall be forced to make an inventory thereof. (pp. 921, 922.)

EXECUTORS and Administrators, Inventory, What Need not Include.—An administrator need not include in his inventory prop-

erty in his hands, which was held by the decedent as a trustee. (p. 921.)

EXECUTORS and Administrators—Estoppel to Claim that Property Recovered is Held in Trust.—An administrator who sues for and recovers property which his decedent held in trust is not estopped thereby, when called upon to include such property in his inventory, from showing the trust and that the estate had no beneficial interest in the property. (p. 922.)

Hyde, Townsend & Tompkins, for the appellant.

W. J. Thayer, for the respondent.

536 MOUNT, J. This is a proceeding brought in the court below by a creditor of the estate of Horatio N. Belt, deceased, to compel the administratrix thereof to show cause why she should not, as such administratrix, inventory as assets of the estate the proceeds of a certain judgment rendered in favor of the decedent during his lifetime, and affirmed after his death by this court in favor of the administratrix, who had in the meanwhile been substituted in decedent's stead.

The petitioner, the appellant here, first became a creditor of the decedent by virtue of a judgment rendered against the decedent August 12, 1898, and during the latter's lifetime, for the sum of \$1,994.72, with costs and interest. This has never been paid or satisfied. At the time of the rendition of this judgment Horatio N. Belt was possessed of certain choses in action against the Washington Water Power Company, a corporation, upon which he afterward brought suit and recovered a judgment for \$21,016, with costs and interest. The facts in relation to this last-named judgment are as follows: In 1892 the Washington Water Power Company gave to Horatio N. Belt and Isaac Kaufman and others a contract for building a street railroad, which the company never built. Suit was brought against the company for damages for failure to build the road. This suit was brought in the name of Horatio N. Belt. Kaufman's interest therein was sold to W. L. and H. C. Belt, who were sons of Horatio N. Belt. All of the interest of H. N. Belt, the plaintiff therein, a short time after the suit was brought, was sold for a valuable consideration to his wife, Martha J. Belt, but the suit was prosecuted to **537** judgment in the lower court in the name of Horatio N. Belt. The case was thereupon appealed to this court, but before the affirmance of the judgment by this court Horatio N. Belt died, and Martha J. Belt, his widow, was, as administratrix, substituted in his stead as a party plaintiff, so

that the remittitur from this court in its essential portion read thus: "Adjudged and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and that the said Martha J. Belt, as administratrix of the estate of H. N. Belt, deceased, substituted respondent, have and recover from the said Washington Water Power Company and from the Fidelity and Deposit Company of Maryland the sum of \$21,016, with interest thereon."

This judgment of affirmance was rendered on May 6, 1901. On May 14, 1901, Martha J. Belt, as such administratrix, received and receipted for the proceeds of the judgment in full. On May 15, 1901, Martha J. Belt, as administratrix of the estate of Horatio N. Belt, deceased, returned and filed her inventory of the estate, containing no account of the proceeds of the judgment against the Washington Water Power Company, and showing no assets whatever.

On June 4, 1901, this proceeding was commenced by J. J. Browne, a creditor of the estate of H. N. Belt, deceased. A petition was filed in the superior court in the estate of Horatio N. Belt, deceased, in which petition it was alleged that the petitioner was a creditor of said estate in the sum of \$2,001.92; that he had presented his claim, which had been allowed; that the administratrix had received the sum of \$21,016, which was the proceeds of a judgment in favor of Horatio N. Belt, deceased; that Martha J. Belt, as administratrix, had filed an inventory of the estate, which inventory ~~was~~ failed to contain any account of the said sum of \$21,016, and failed to show any assets whatever of said estate; that a demand had been made upon said administratrix to include the said \$21,016 in her inventory of said estate, which demand was refused; and concluded with a prayer that said administratrix be required to inventory the said sum of \$21,016, or show cause why she should not do so. An order was issued as prayed for. In answer thereto the administratrix admitted that she had received the proceeds of the judgment in question as administratrix, but alleged by way of affirmative matter that the action in which said judgment was rendered had been prosecuted by deceased during his lifetime as agent and trustee for the use and benefit of Martha J. Belt, and his two sons, W. L. and H. C. Belt, and that by virtue of certain declarations of trust and assignment of the cause of the action all interest in the judgment thereon was in the widow and children, and that the proceeds thereof were not assets of the estate of Horatio N. Belt, de-

ceased. The petitioner demurred to the affirmative matter in the answer on the ground that it did not state matters constituting a defense. The demurrer being overruled, a reply was filed denying the allegation of new matter, and also alleged that Martha J. Belt, having received the proceeds of the said judgment as administratrix, is estopped to deny that it does not belong to the estate of H. N. Belt, deceased. Upon the issues made the cause was tried by the judge of the superior court sitting in probate in the estate of H. N. Belt, deceased, and the court found that the proceeds of the judgment were not the property of the estate, and dismissed the petition. From this order this appeal is prosecuted.

Appellant argues the errors assigned under three heads, substantially as follows: 1. Respondent having recovered the judgment and received the proceeds thereof as ⁵³⁹ administratrix, she is, as such administratrix, estopped in a proceeding against her as such, to deny that said proceeds constituted assets of the estate; 2. Assuming that there is no estoppel upon the administratrix, the probate court had no power to hear, try, or determine in this proceeding, the title of third parties claiming the fund in question; 3. Assuming that the probate court had power to determine the title of third parties to the money in question, and that the evidence showed it to have been held by decedent as a trust fund, yet having been recovered and received by the administratrix in that capacity, it had to be held and accounted for, in the form in which it was recovered.

Appellant cites a number of cases in support of the first point, but upon examination we find all these to be cases where the money was actually the property of the estate, and liable for the debts thereof. They do not discuss the point whether trust funds, as such, are assets of the estate, and liable for the debts of the decedent; nor do they hold that, where an administrator receives and receipts for a fund which is a trust fund, that such funds must be inventoried and held by him as other property of the estate liable for decedent's personal debts. Where a person dies possessed of trust funds, such funds do not, by reason of the death of the trustee, become liable for the debts of his estate. The relation of the cestui que trust is not changed. The property still belongs to him. While the administrator is no doubt entitled to the possession of the trust funds, he is liable to account therefor to his principal either in his individual or representative capacity: De Valengin's

Admrs. v. Duffy, 14 Pet. 282. He is not bound to proceed in the execution of the trust, but must preserve the fund for those entitled thereto: 2 Woerner's American Law of Administration, 2d ed., sec. 321. It has been held that ⁵⁴⁰ an inventory is not conclusive as to the decedent's ownership of the property, either against a third person or against an executor or administrator: *Lamme v. Dodson*, 4 Mont. 560, 2 Pac. 298; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889; *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489, 1067; *Fulcher v. Mandell*, 83 Ga. 715, 10 S. E. 582; *Stewart's Estate*, 137 Pa. St. 175, 20 Atl. 551; *White v. Shepperd*, 16 Tex. 163. If the filing of an inventory is not conclusive against the claim of an administrator to property therein contained, certainly where the administrator comes into possession of property, and refuses to inventory it upon the claim that it does not belong to the estate, but belongs to some third person or to himself, no estoppel as to the title can be pleaded simply because, as in this case, the property was received in a representative capacity.

It is next argued that the probate court had no power in this proceeding to determine the title of third parties claiming the fund in question. This court held in *Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457, that the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto: See, also, *Huston v. Becker*, 15 Wash. 586, 47 Pac. 10; *In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593. Under these decisions the superior court sitting in probate had no jurisdiction to determine the title of third parties claiming the fund. But we do not understand from the record in this proceeding that the court undertook to determine the title of any person to the property. The court found as a fact: "That the moneys mentioned in the petition are not any part of the assets of the estate of said deceased," and for that reason dismissed the petition. The statute provides at section 6201 of Ballinger's Code: ⁵⁴¹ "Every executor and administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of the real and personal estate of the deceased, which shall come to his possession or knowledge."

Section 6204: "The inventory shall also contain an account of all moneys belonging to the deceased, which shall have come to the possession or knowledge of the executor or administrator; and if none shall come to his possession or knowledge, the fact shall be so stated in the inventory."

Section 6209: "Whenever property not mentioned in an inventory shall come to the knowledge and possession of the executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an additional inventory to be returned, subscribed and sworn to as is provided in this chapter, as soon as practicable after the discovery thereof and the making of such inventory may be enforced, after notice, by attachment to which may be added the revocation of the letters."

These proceedings were instituted under this last section by a petition filed by appellant in the estate of Horatio N. Belt, deceased, in the probate department of the superior court. The respondent was notified to include the money in question in the inventory or show cause why she did not do so. She appeared in obedience to the notice, and showed that the property did not belong to the estate. One of two rules must obtain: viz., respondent was either entitled to be discharged upon her answer, or the court had jurisdiction to determine the question whether the property belonged to the estate, or there was a reasonable claim thereto by the estate. Neither rule aids the appellant, because, if the first rule obtains, it was the duty of the court to dismiss the petition when the answer was filed. The second rule was followed, and we think this rule must prevail. ⁵⁴² that when a question arises, in the administration of an estate, whether property shall be inventoried as a part of the estate or not, the probate court may hear evidence sufficient to determine whether the property in question belongs to the estate, or the estate has any interest therein, or has reasonable claim thereto, which claim may become an asset of the estate; not for the purpose of judicially determining the title of any property claimed by any third person, but to determine the good faith of the claim. The statute does not require property or money to be inventoried, unless it belongs to the estate, and the court will not require money to be inventoried which does not belong to the estate, and is not an asset thereof. Mr. Schouler, in his work on Executors, third edition, at section 205, says: "If goods, money, or securities belonging to another person lie amongst the goods of the deceased capable of identification, and they come altogether to the hands of the personal representative, such other person's things are not to be reckoned among assets of the estate. Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of his property. So, property held by a trustee or

fiduciary officer is not assets in the hands of his executors administrators or assignees; but a new trustee should rather be appointed to hold the fund in the stead of the decedent. Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust or as the bailee or factor of another."

Mr. Woerner, in his work on the American Law of Administration, second edition, volume 2, section 317, says: "The executor or administrator can be required to inventory only the property which belonged to the decedent at the time of his death, in his own right, or to which the personal representative is entitled in his official capacity, as distinguished from the heir, legatee, widow, or donee mortis causa of the testator or intestate. The court has no ⁵⁴³ power therefore, to compel the administrator to inventory property not clearly belonging to the estate. On the other hand, the court should not reject an inventory exhibited because it contains property the title of which is in dispute; because, as appears in a former chapter, the probate court has no power to try the title to property between the personal representatives and strangers": See, also, *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257, 23 Pac. 986, 8 L. R. A. 788, and note; 11 Am. & Eng. Ency. of Law, 2d ed., 849, and authorities cited.

In a case of this kind the court has jurisdiction to determine prima facie the fact whether or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterward claiming the property in another forum, but is for the purpose only of determining whether the administrator shall be forced to make an inventory thereof.

Appellant's last point, viz., assuming the money in question to be a trust fund, yet, having been recovered and received by the administratrix acting in that capacity, it must be held and accounted for in the forum in which it was received, cannot aid him. Much of what is said above on the first point applies equally to this one. But if we concede that appellant is correct in this position, we are unable to see how he is interested therein, because he is a creditor of the estate of Horatio N. Belt, deceased. Only the assets of that estate are liable for this claim. If these funds are trust funds, not belonging to the estate, and which deceased, as agent, was engaged in collecting in his lifetime for his principal, and to be accounted for by Mrs. Belt as administratrix, she must account to her prin-

principal for the whole thereof: 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 1063 et seq. The personal debts of Horatio N. Belt cannot be paid from these funds. The personal creditors of Horatio N. Belt therefore have no interest in having the same included in the inventory of his estate.

There is no error in the record and the cause is affirmed.

Reavis, C. J., and White, Anders, Hadley, and Dunbar, JJ., concur.

An Inventory is not conclusive for or against the administrator, but is open to explanation or denial: Cameron v. Cameron, 15 Wis. 1, 82 Am. Dec. 652.

Upon the Death of a Trustee of an express trust of personal property, the trust estate descends to his personal representative: Repburn v. Mitchell, 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. 592. See Byrne v. McGrath, 130 Cal. 316, 80 Am. St. Rep. 127, 62 Pac. 559, on the effect of the death of a trustee on the trust.

PRATHER v. CITY OF SPOKANE.

[29 Wash. 549, 70 Pac. 55.]

MUNICIPAL CORPORATIONS—Liability of for Paths Voluntarily Maintained.—If a city constructs and maintains a bicycle path, which it permits and requires persons to use, the same rules apply, as to method and care in the construction and maintenance, as where there is a duty imposed by law, to wit, that the path must be safe for the ordinary use for which it was intended. (p. 926.)

MUNICIPAL CORPORATIONS—Liability of for Injuries Due to Errors in the Construction of a Path.—If a bicycle path is located and constructed with a sharp turn, because of which it is unsafe for the ordinary travel for which it was intended, the municipality cannot escape liability on the ground that the locating of the path was a governmental duty for which no action can be sustained. (p. 927.)

MUNICIPAL CORPORATIONS—Liability of for Defects in a Bicycle Path Where Other Parts of the Street Were Safe.—If a municipal corporation constructs and maintains a bicycle path along one side of a public street, and invites and requires all persons who travel such street on bicycles to use such path, the municipality cannot escape liability to a person injured by a defect in the street on the ground that other paths in the street were safe for bicycles. (pp. 927, 928.)

MUNICIPAL CORPORATIONS—Bicycle Paths, Dangerous Because of Outside Obstructions.—If a bicycle path is maintained by a municipal corporation in a dangerous condition, in this, that because of a sharp turn, a rider may run into and be injured by an

obstruction situate outside of the path, the corporation is not rendered less liable for injuries received by the fact that they are not received upon, but outside of, such path. (p. 928.)

John P. Judson and G. H. Kenyon, for the appellant.

C. S. Voorhees and Reese H. Voorhees, for the respondent.

550 MOUNT, J. Action for personal injuries. Defendant below objected to the introduction of evidence on the part of the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This objection was overruled, and defendant excepted. This ruling of the court is the only error assigned. The paragraphs of the complaint necessary to be considered are as follows:

"3. That during all of said times, and for a long time prior thereto, there were within said city a certain street running north and south therethrough, called and known as Division street, and a certain avenue running east and west there-through, called and known as Augusta avenue, both of which said street and avenue being public thoroughfares belonging to and in the charge and control of said city.

"4. That during all of said times and for a long time prior thereto, the said city had made and constructed a **551** certain public thoroughfare therein called and known as a cinder path, running north and along the east side of said Division street to the north side of said Augusta avenue at their intersection, and thence east, on and along the north side of said Augusta avenue, over and upon which cinder path the said city invited and required all persons to travel who might travel on said street or avenue by means of bicycles, which cinder path was constructed by and under the direction of said city, and during all of said times, and for a long time prior thereto, was maintained by it for said purpose.

"5. That during all of said times and for a long time prior thereto, said cinder path, at the place where the same turned from said street east onto said avenue, was carelessly, negligently and defectively constructed and maintained by said city, and dangerous to travelers thereon, in this: That said turn was a sharp right angle turn made within about four feet of where there existed the street gutter and board sidewalk, also constructed and maintained by said city for a long time prior to all of said times mentioned herein, at the northeast corner of the crossing of said street and said avenue, which street gutter was about eight inches below said turn, from which gutter

arose said board sidewalk about one foot in height, both of which said gutter and sidewalk lying immediately north of said turn and in line with said cinder path, going north and transverse to the north and south line of said cinder path; that immediately upon turning east at said place said cinder path was constructed on ground which arose to an elevation of about eighteen inches above said turn and thence proceeded east at that elevation; that said cinder path at said place was lower than the adjacent parts thereof, and dim and indistinct, and on account of said construction, and maintenance of said cinder path, curb and gutter, in the manner and under the condition hereinbefore described, the use of said cinder path was dangerous and unsafe, and a person traveling north thereon by bicycle at any time in the dark of an evening could not see, or know from its appearance, that there was a turn in said 552 cinder path at said place, nor see or know of said street gutter or sidewalk beyond, and would be in danger of riding on past said turn into said gutter, and against said sidewalk.

"6. That during all of said times, and for a long time prior thereto, to wit, for the period of six months, the said city negligently and carelessly failed, neglected and refused to repair, remedy or in any wise to correct said defective, dangerous and unsafe conditions of said curb, gutter and cinder path, so constructed and maintained by it as aforesaid, and carelessly and negligently failed, neglected and refused to place or maintain any barrier, sign, light, or other means at said turn or elsewhere, to show or notify travelers on said cinder path where said turn was, or to protect such travelers from injury on account of said dangers and defects, by running into said street gutter and against said sidewalk, and that because thereof, prior to the injury to this plaintiff herein recited, a great number of other persons had been injured at the same place and in a similar manner, and that because of said long continuance of said defective, dangerous and unsafe conditions of said curb, gutter and cinder path, and the occurrence of said injuries to other persons, defendant had notice of said defective, dangerous and unsafe conditions and ought to have known thereof.

"7. That on the third day of November, 1899, at about 6 o'clock P. M., it then being dark, plaintiff was rightfully traveling on said cinder path on a bicycle, going north to his home in said city, having no knowledge or notice of any kind of any of said defects in, or negligent construction of, said cinder path,

or said curb or gutter, or any danger therefrom and on account of said negligent and defective construction of said cinder path and through and because of the defective and negligent construction of said curb and gutter, and through and because of defendant's negligence in leaving said curb and gutter, constructed as hereinbefore described, close to and in the line of said cinder path as hereinbefore set forth, and through and because of defendant's neglect, failure and refusal to ⁵⁵³ repair, remedy and correct said defective, dangerous and unsafe condition of said curb, gutter and cinder path, as hereinbefore set forth, and through and because of defendant's said negligence in failing to place or maintain proper or any such signs, barriers, lights or other means of protection at said turn in said path, plaintiff rode his said bicycle into said street gutter and against said board sidewalk, throwing him with great violence upon and against said sidewalk, striking his head violently thereon, greatly bruising and cutting his head and face, causing injury to plaintiff's brain and nervous system, paralyzing the optic nerve of his right eye so as to cause atrophy of said optic nerve and blindness of said right eye, badly wrenching and spraining his left wrist and elbow and causing him great and permanent general physical weakness. That on account of said fall plaintiff suffered great physical and mental pain and anxiety. That plaintiff's left arm has only partly recovered from said wrenching and spraining. That plaintiff's right eye has become practically permanently blind."

The negligence here alleged is: 1. In the construction and maintenance of a dangerous way; and 2. Negligence in failure to repair, remedy, or correct the danger by constructing a barrier, sign, light, or other means, so as to notify travelers of the danger. It is first argued by the appellant that the city was not required to construct these bicycle paths; that it was optional with the city to do so or not, as it chose; and that, therefore, the liability arising from the mandatory duty is not imposed upon the appellant. Conceding this to be the rule, it does not apply in this case, because it is alleged that the path was constructed. The city having exercised its option to construct the path, the same rules must apply to the method and care in the construction and maintenance as applies where there is a duty imposed by law, viz., to so construct and maintain the path or street or walk that the same may ⁵⁵⁴ be reasonably safe for the ordinary use for which it was intended: *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273;

Lorence v. Ellensburg, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; Taake v. Seattle, 18 Wash. 178, 51 Pac. 362; Rowe v. Ballard, 19 Wash. 1, 52 Pac. 321; White v. Ballard, 19 Wash. 284, 53 Pac. 159.

It is next argued that the action is not based upon any defects in the construction of the path, but that the negligence consists in the location of the path at a sharp turn near the curb, the sidewalk, and gutter, and that this is a governmental duty for which no action can be maintained for damages sustained by reason of the location of the improvement upon the street. But this court said in *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273. "In the first place, we are of the opinion that the laying out, repairing and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. . . . But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby: *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705. In the second place, we think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty. There is undoubtedly a want of harmony among the decisions of the courts upon this question, but we believe the decided weight of authority, as well as sound reason, is in favor of the view above expressed."

This rule has been followed by this court in the cases cited, *supra*. It follows, therefore, that, if the path in ⁵⁵⁵ question was so constructed as to be unsafe for the ordinary travel for which it was intended, the city is liable to one who is injured using it in the ordinary way and not negligent himself.

It is also argued that the complaint shows that the streets themselves were safe and unobstructed for the use of vehicles; that a bicycle is a vehicle, and that the respondent was not obliged to travel the path, but may have used the street without injury. This may be conceded, and yet it does not relieve the city from liability. When the city constructed the cinder path, and "invited and required all persons who might travel on said street or avenue by means of bicycles" to go over and upon the path, persons so traveling had a right to assume that the same

was safe for the use of bicycles in the ordinary way: *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Taake v. Seattle*, 18 Wash. 178, 51 Pac. 362. The fact that other parts of the street were safe for bicycles would not relieve the city from liability where it had invited a particular kind of vehicle to go upon this particular way. The way must be made reasonably safe for the vehicle for which it is designed. A street may be safe for pedestrians, but where a sidewalk is provided therefor pedestrians may go upon the walk, and assume it to be safe. So, also, a sidewalk may be safe for wagons and other vehicles, but where a street is provided therefor they may assume the street is safe, and go upon the way provided. The same is also true of a path erected for bicycles. For an injury resulting in either case from a dangerous way negligently constructed or maintained the municipality is liable: *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321.

It is alleged in the complaint at paragraph 5 that "said cinder path, at the place where the same turned from said street east onto said avenue, was carelessly, negligently, ⁵⁵⁶ and defectively constructed and maintained by said city, and dangerous to travelers thereon, in this: That said turn was a sharp right angle turn made within about four feet of where there existed the street gutter, and board sidewalk, also constructed and maintained by said city, . . . which street gutter was about eight inches below said turn, from which gutter arose said board sidewalk about one foot in height, . . . and on account of said construction and maintenance of said cinder path, curb, and gutter, . . . the use of said cinder path was dangerous and unsafe, and a person traveling north thereon by bicycle at any time in the dark of an evening could not see, or know from its appearance, that there was a turn in said cinder path at said place." By the sixth paragraph it is alleged that the city had notice of the dangerous and unsafe conditions, and neglected to repair or remedy the same, or to maintain any barrier, sign, light, or other means to notify travelers of the danger. In *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321, this court said: "And we know of no law which will allow a city to dig an excavation or to establish or make any pitfall within its corporate limits, and maintain the same without guards or warnings of any kind to the traveling public without being held responsible in damages to the parties who, without fault, fall into the same, even though such streets may not have been formally graded."

But it is said the complaint shows that the obstructions com-

plained of were not located upon the path, but were outside thereof, and were of themselves necessary and proper. In *Alger v. Lowell*, 3 Allen, 402, the court says: "The true test, on the contrary, is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk ⁵⁵⁷ of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

In *Davis v. Hill*, 41 N. H. 329, the court says: "It seems entirely clear, upon the authorities, that the want of a sufficient railing, barrier, and protection, to prevent travelers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstruction, without the limits of the road but in the general direction of the travel thereon, may properly be alleged as a defect in the highway itself": See, also, *Palmer v. Andover*, 2 Cush. 600; *Higert v. Greencastle*, 43 Ind. 574. From the foregoing rule it follows that, if the city was maintaining a dangerous and unsafe path for bicycles, which it invited to go upon the path, with knowledge and notice of the danger, and neglected to remedy the same, and to place and maintain any barrier, sign, or other means to notify travelers of the danger, that the city is liable to one who is injured, using ordinary care, while traveling thereon, and the complaint therefore states a cause of action.

The fact that the respondent was traveling thereon in the night-time, or without light, or that he was riding carelessly and negligently, or that he knew of the danger, or that he might have seen and avoided it, are all facts which do not appear in the complaint, but which were proper to be set up in defense, and which the jury, under proper instruction, were required to pass upon, and which we presume were set up and properly passed upon, because no question is raised or can be considered on this appeal except the one already considered.

For the reasons stated the judgment is affirmed.

Reavis, C. J., and Hadley, Anders, White, and Dunbar, JJ., concur.

A City is Under an Absolute Duty to keep its streets and sidewalks in a safe condition for public travel: Deming v. Terminal Ry., 169 N. Y. 1, 88 Am. St. Rep. 521, 61 N. E. 983; Blyhl v. Waterville, 57

Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817. As to whether this duty extends to boulevards, see McDonald v. St. Paul, 82 Minn. 308, 84 N. W. 1022, 83 Am. St. Rep. 428, and cases cited in the cross-reference note thereto.

STATE v. BUCHANAN.

[29 Wash. 602, 70 Pac. 52.]

CONSTITUTIONAL LAW—Statute Limiting Hours of Employment of Females.—A statute providing that no female shall be employed in any mechanical or mercantile establishment, laundry, hotel, or restaurant, in this state more than ten hours during any day, is constitutional. (p. 936.)

Walter S. Fulton, prosecuting attorney, for the state.

Preston, Carr & Gilman, for the respondent.

603 DUNBAR, J. This case involves the constitutionality of a law enacted by the legislature of 1901 (Session Laws, p. 118), entitled "An act to regulate and limit the hours of employment of females in any mechanical or mercantile establishment, laundry, hotel and restaurant; to provide for its enforcement and a penalty for its violation." Section 1, the subject of this discussion, is as follows: "That no female shall be employed in any mechanical or mercantile establishment, laundry, hotel or restaurant in this state more than ten hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four."

Section 3 provides that: "Any employer, overseer, superintendent, or other agent of any such employer who shall violate any of the provisions of this act, shall, upon conviction, be fined," etc.

The information charged, in substance, the violation of this law. To this information a demurrer was interposed upon the ground that no offense was charged, which demurrer was sustained by the court. From such ruling and the judgment following, this appeal is taken.

604 This act cannot be held to be special legislation, and, if it is obnoxious to the constitution at all, it is so because it is an arbitrary restriction upon the fundamental right of the citizen (a woman in this case) to contract her labor, thereby violating section 3 of article 1 of the state constitution, which provides that

no person shall be deprived of life, liberty, or property without due process of law. It may be conceded without discussion that a citizen's right to contract his or her labor is a valuable property right, which cannot be restricted by the legislature, unless such restriction is necessary in the proper exercise of the police power of the state. Courts and law-writers have found it difficult to furnish an exact definition of the term "police power," or to define its boundaries, and no other subject has been the source of so much important and earnestly contested litigation, for the citizen is jealous of what he considers to be his inalienable rights, and strenuously resists any encroachment upon his liberty; while the state, with its solicitude for the welfare of society at large, frequently finds it necessary—or at least thinks it does—to lay a restraining hand upon what is deemed by the citizen his private rights. Blackstone's definition of this power is, "the due regulation and domestic order of the kingdom, whereby the inhabitants of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations." It has also been defined as a general system of precaution for the prevention either of crime or of calamities. It has been said to be the great power of necessity in the administration of governmental affairs. It is, in short, that power which enables the state to promote and protect the health, welfare, and safety of society; and it is essential to the very existence of government ⁶⁰⁵ that all property should be held subject to such reasonable limitations and restraints in its enjoyment as will preclude it from acting injuriously upon the public welfare. Conceding that an arbitrary exercise of the legislative will, which, under the guise of a police power, restricts constitutional rights, cannot be maintained, we are of the opinion that the act in question was a legitimate exercise of the police power of the state, enacted for the welfare of society at large, and is therefore constitutional.

On this subject the authorities are somewhat divided, though we think the great weight of modern authority sustains statutes similar to the one under consideration. The case of *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120, is cited to sustain the theory of the unconstitutionality of this act. That was a *per curiam* opinion, without any discussion of the principles involved, and, while it cited with commendation the case of *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58

Pac. 1071, on the subject under discussion, the real point decided in *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120, was that an ordinance which makes it unlawful for any contractor upon any of the public works of the state to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day was unconstitutional, on the ground that it interfered with the right of persons to contract with reference to their services. We think that all authority sustains this doctrine; but that and similar cases are not in point here, although the case cited, viz., *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, did hold that a statute of the character under discussion here was unconstitutional, on the ground that the police power could not extend beyond cases where the injury was sustained by the public, and not by the individual in question. While this proposition, in the abstract, is probably true, it is not practically stated, for ~~606~~ practically under our system of government no one citizen stands segregated entirely from the citizens at large, but that which has a deleterious effect on one citizen to some extent deleteriously affects others. In any event, this court in *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, took the opposite view on that question from the Colorado court. *Ah Lim* was indicted for violating a statute which provided that any person or persons who shall smoke or inhale opium shall be deemed guilty of a misdemeanor, and it was contended that, inasmuch as the bad effects, if any, of such an indulgence, were visited only upon the person who inhaled or smoked the opium, it was not within the police power of the state to prohibit such smoking or inhaling, on the ground that it was interfering with inalienable rights—the right that every man had to do what he would with his own which would not interfere with the reciprocal rights of others. In that case no special constitutional limitation or inhibition was pointed out with which the law was in conflict. The contention was based upon the broad ground that the right to liberty and the pursuit of happiness was violated, and this court held that whether the habit was detrimental to either the moral, mental, or physical well-being of one of its citizens to such an extent that he was liable to become a burden upon society was a question to be put on foot by the legislature, and a question to be determined by the legislature; and that, granting that it was a proper subject for legislative enactment and inquiry, no limit or control could be placed on the legislative discretion. In *Ritchie v. People*, 155 Ill. 98, 46 Am. St.

Rep. 315, 40 N. E. 451, it was held that an act prohibiting the employment of females in any factory or workshop for more than eight hours a day was unconstitutional, as it was an arbitrary restriction upon the fundamental right of the ⁶⁰⁷ citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they were competent to agree with each other. This is the only case cited to us, or that we have been able to find, in which an act of this kind is decided to be unconstitutional by a court of last resort. But we are not inclined to follow the reasoning of the court in that case, although it is well considered and ably presented. But some of the cases that it cites to sustain the contention that the law was invalid do not seem to us to bear out the contention. For instance, *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737, where it was held, as it is universally held, that an ordinance making it a misdemeanor for any contractor to employ any person to work more than eight hours a day, where the work was to be performed under any contract with the city, was unconstitutional. The court in that case specially distinguished this kind of a case when it said: "If the services to be performed were unlawful or against public policy, or the employment was such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation."

In referring to the case of *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, it was said by the Illinois court: "Laws restraining the sale and use of opium and intoxicating liquor have been sustained as valid under the police power. Undoubtedly, the public health, welfare and safety may be endangered by the general use of opium and intoxicating drinks. But it cannot be said that the same consequences are likely to flow from the manufacture of clothing, wearing apparel and other similar articles."

It must be borne in mind that *Ah Lim* was not indicted for procuring others to smoke opium, but for smoking ⁶⁰⁸ himself, and we hardly see how the question of what the consequences would be from the manufacture of clothing or wearing apparel could affect the question of prohibiting the employment of females in the factory or workshop where these articles were made. The statute was enacted, not because the manufacture of clothing or wearing apparel had any bad effect upon society, but because the employment of women for more than

eight hours a day in that character of work would have a deleterious effect upon the employees, and in a degree upon society. In opposition to the doctrine announced in *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, it was held by the supreme court of Massachusetts in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, that a statute prohibiting the employment of women laboring in any manufacturing establishment more than sixty hours per week violated no right preserved under the constitution to any individual citizen, and that such an act could be maintained as a health or police regulation. That case is directly in point and was favorably referred to by the supreme court of the United States in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, a case which came up from Utah, where it was held by the state court and affirmed by the supreme court of the United States that a statute limiting the period of employment of workmen in underground mines or refining of metals to eight hours a day, and making its violation a misdemeanor, was a valid exercise of the police power of the state. This case is in direct conflict with the doctrine announced in the case of *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, and *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, and, if not binding upon this court, should have great weight, for the reason that the constitutional right which is claimed to have been infringed by this act is identical with the provision in the fourteenth amendment to the constitution of the United States, viz., that no state shall deprive any "person" of life, liberty, or property without due process of law. The rule is announced by Parker and Worthington on Public Health and Safety, page 299, as follows:

"The state may forbid certain classes of persons being employed in occupations which their age, sex or health renders unsuitable for them, as women and young children are sometimes forbidden to be employed in mines and certain kinds of factories. And statutes are perfectly valid which provide that women or minors shall not be employed in laboring by any person, in any manufacturing establishment, more than a certain number of hours in any one day, with reasonable exceptions. Of such laws it has been said that they do not violate any constitutional rights."

Mr. Cooley, in his *Constitutional Limitations*, sixth edition, 744, says: "The genral rule undoubtedly is, that any per-

son is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible, for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection."

Ritchie v. People, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, noted approvingly In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, where it is said: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at ⁶¹⁰ least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end."

Accepting this statement of the law, we think it is easily ascertainable from a perusal of this act that its object was the public health, and that its provisions were appropriate, and adapted to that end. It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals. Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction and restraint. This all flows from the old announce-

ment made by Blackstone that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it ⁶¹¹ suited their private interests. The practice of medicine is restricted and controlled; laws against quackery and empiricism are enforced without question. The sale of liquor, which formerly was a legitimate business, and which the citizen had a right to enter into, as he did any other business, without any restrictions, has now become subject to the control of the state, or to actual prohibition at the will of the state. The changing conditions of society have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society.

We think no constitutional right is invaded by this law, and the case will be reversed, with instructions to overrule the demurrer to the complaint.

Reavis, C. J., and Anders, Mount, Fullerton, Hadley, and White, JJ., concur.

The Decision of the Court in the Principal Case is partly placed upon a ground which is more applicable to males than to females. Very probably legislation respecting the hours of labor of females might be defended on the ground that they, like children, are less able to protect themselves than men, and more subject to injury from long-continued, uninterrupted employment. The principal case, however, is but partly rested upon these grounds, and would seem to be an authority for the general proposition that the legislature might in all cases limit the hours of service of employes. If so, it is in direct conflict with *City of Cleveland v. Clements Bros. Construction Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885, in which an act was declared unconstitutional, because it undertook to limit the hours of daily service of laborers, workmen, and mechanics employed upon public works or work done for the state of Ohio, or for any political subdivision thereof, and provided for the insertion of certain stipulations in contracts for public work. Such statute was held to be unconstitutional, on the ground that it violated and abridged the right of parties to contract as to the number of hours which should constitute a day's work, and invaded and violated the right, both of liberty and of property, and denied to municipalities and to contractors and subcontractors the right to agree with their

employés upon the terms and conditions of their contracts. It was further held that stipulations inserted in contracts pursuant to the provisions of the statute in question must be regarded as coerced thereby, and therefore as not obligatory upon the contracting parties.

On the Constitutionality of Statutes limiting the hours of labor of people engaged in certain employments, the authorities are conflicting: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 244, 245; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 938, 60 Pac. 1120.

NOYES v. COSSELMAN.

[29 Wash. 635, 70 Pac. 61.]

WATER, Surface.—An Owner of Land has no Right to Bid His Land of Surface Water by collecting it into artificial channels and discharging it upon the lands of an adjacent proprietor, to the latter's injury. (p. 940.)

WATERS in a Lake, Right to Turn Upon the Lands of Another.—An owner of lands on which a lake is situated has no right to improve such lands by cutting through a natural barrier, and thereby draining them upon the lands of adjacent proprietors, though the latter might, in turn, protect themselves by diking and ditching, or by constructing such an artificial barrier on their lands as might prevent the flow of such water thereto. (p. 942.)

Graves & Graves, for the appellants.

Poindexter & Kimball, for the respondents.

636 MOUNT. J. Plaintiffs are the owners of several tracts of land comprising about four hundred and fifty acres, in Spokane county. These lands are flat and level, having formerly been swamps, but in the last eighteen years have been drained by means of ditches at large expense to the plaintiffs, so that they are now valuable hay lands, producing annually large crops of timothy hay. Lying to the southwest of the lands of plaintiffs is a large marsh, about three miles in length, of varying width, comprising about three hundred and seventy-five acres of land. This marsh, commonly called "Long lake," is in a natural depression on defendants' lands, which are contiguous to and adjoin plaintiffs' lands. Water accumulates in this marsh to a depth of from four inches to two feet each year from rains and melted snows, which fall upon an area of several square miles to the north and west. This water has no outlet from the marsh except at extreme wet seasons, when it overflows through a depression in a natural barrier

on defendants' land and runs off into a small pond, also on defendants' lands, and thence runs off over the lands and through the ditches made by plaintiffs. At other seasons of the year the waters of this swamp are dissipated by evaporation and percolation until about the month of June, when the lake becomes nearly dry. On the lands of defendants, and between Long lake and the pond above referred to, is a natural ⁶³⁷ barrier some four feet in height and about two hundred feet wide. There is a natural depression in this barrier, through which the water runs from Long lake into the pond when the water is deepest in wet seasons. When plaintiffs began the construction of the ditches which now drain their lands they requested the defendant Cosselman, who owns the greater part of Long lake, to join them, which he refused to do. The lands of defendants, on which Long lake is situated, are about six feet higher than the lands of plaintiffs, and the defendants were engaged in digging a ditch and widening the depression in the natural barrier above referred to, so as to drain the water from Long lake, when this suit was begun to restrain them therefrom. The lower court found upon the trial, we think correctly, that, if the defendants proceed to complete said ditch as they intend and have commenced, then the waters of Long lake will be drained upon the lands of plaintiffs, and will entirely destroy the crops of timothy now growing thereon, and render said lands, or a great portion thereof, incapable of cultivation until the same shall again be drained at great labor and expense.

There is but one question to be determined in this case, namely, Have the defendants the right to improve their property by draining this swamp, Long lake, from one portion of their land to another, whereby injury will result to the plaintiffs if they do not take steps to protect themselves by diking or ditching against the waters thus turned upon them?

The appellants here rely upon the rule announced by this court in *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859, which was a case where lands lying along a river were subject to inundation at times of high water unless protected by means of dikes. The defendants in that case were lower proprietors, and were proceeding ⁶³⁸ to erect a large dike for the purpose of preventing their lands from being flooded during extraordinary freshets. The plaintiffs brought the action to restrain the erection of the dikes upon the ground that the same would prevent the seepage, surface water and overflow

from flowing from their premises, as it was accustomed to do, and thus destroy their crops and render their farm valueless. This court, passing upon the question there presented, said:

"The courts of some of the states have adopted the rule of the civil law, by virtue of which a lower estate is held subject to the easement or servitude of receiving the flow of surface water from the upper estate. Under that rule it is clear that the flow of mere surface water from the premises of an upper proprietor to those of a lower may not be obstructed or diverted to the damage of the latter. But the contrary rule of the common law has been adopted in many of the states and must be followed in this case, because it is neither inconsistent with the constitution and laws of the United States nor of this state, nor incompatible with the institutions and condition of society in this state: Code Proc., sec. 108.

"By that law surface water, caused by the falling of rain or melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others. The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon and beneath the surface: 24 Am. & Eng. Ency. of Law, 906, 917; Angell on Watercourses, 7th ed., sec. 1080.

"If one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria*."

639 It was therefore held that the lower proprietor had a right to construct the dike in order to protect his own land. And it is argued in this case that the appellants here have a right to drain the water which accumulates in Long lake from rains and melting snows through an artificial ditch built for that purpose through a natural barrier upon their own land, and cast the same upon lower lands of their own, from whence it is cast upon respondents' lands, and that the damage thus caused to respondents is *damnum absque injuria*; that the only remedy of respondents is to dike against the flow of water, and thereby keep it upon the lands of appellants or to construct ditches to carry off the increased water. If the position of appellants that respondents may dike against the water

thus turned upon them is correct, under the rule announced in *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859, still we do not think it necessarily follows that the appellants may by artificial means turn the water from Long lake upon other parts of their own lands, to the injury of respondents. The rule that an owner of land has no right to rid his land of surface water by collecting it in artificial channels, and discharging it upon the land of an adjoining proprietor, to his injury, is followed alike in the states which have adopted the common law as well as those which have adopted the rule of the civil law: 24 Am. & Eng. Ency. of Law, 931; Gould on Waters, 3d ed., sec. 271; Angell on Watercourses, 7th ed., sec. 108j; Washburn on Easements, *353; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Templeton v. Voshloe*, 72 Ind. 134, 37 Am. Rep. 150; *Schuster v. Albrecht*, 98 Wis. 241, 67 Am. St. Rep. 804, 73 N. W. 990; *Jackman v. Arlington Mills*, 137 Mass. 277; *Hogeson v. St. Paul etc. Ry. Co.*, 31 Minn. 224, 17 N. W. 374; *Illinois Cent. R. R. Co. v. Miller*, 68 Miss. 760, 10 South. 61; *Brandenberg v. Ziegler*, 62 S. C. 18, 89 Am. St. Rep. 887, 39 S. E. 790; 640 *Kelly v. Dunning*, 38 N. J. Eq. 482. The foregoing cases are from states adopting the common-law rule: the following are from states adopting the civil-law rule: *Anderson v. Henderson*, 124 Ill. 164, 16 N. E. 232; *Gregory v. Bush*, 64 Mich. 37-42, 8 Am. St. Rep. 797, 31 N. W. 90; *Butler v. Peek*, 16 Ohio St. 334, 88 Am. Dec. 452; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746; *Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563.

In *Barkley v. Wilcox*, 86 N. Y. 147, 40 Am. Rep. 519, the court says: "The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. . . . But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it and is retained upon the lands above. There is a manifest distinction between casting water upon another's land, and preventing the flow of surface water upon your own."

In *Jackman v. Arlington Mills*, 137 Mass. 283, the court says: "We take the law to be, that the owner of land has no right to collect the surface water into an artificial stream, and discharge it upon the adjoining land of another in such quantities and in such a manner as materially to injure the land; but that such an owner has the right to collect the surface water and the natural drainage of his land into an artificial stream, and discharge it into a natural watercourse on his own land, if the watercourse is the natural outlet of the waters thus collected, even although, ⁶⁴¹ by this artificial arrangement, the flow of the waters is accelerated, and the volume at times is increased, provided that this is done in the reasonable use of his own land, and that the discharge is not beyond the natural capacity of the watercourse, and the land of a riparian owner is not thereby overflowed, and materially injured. But he has no right to subject the land of another to a servitude of running water to which it is not naturally subject."

In *Hogenson v. St. Paul etc. Ry. Co.*, 31 Minn. 226, 17 N. W. 374, it is said: "The acts of the defendant amount to this: That, being incommoded by the presence of surface waters on its lands, it, by means of ditches, accumulates them and transfers them to the lands of others, where they would not otherwise go, to the damage of the latter lands. Without a grant of the right, it cannot do this. The right of an owner to improve his land for the purpose for which such land is ordinarily used, and to do it in the ordinary manner, as by building on it, or raising the surface where necessary to its improvement, even though as an incident to it the rain and snow waters falling on it may be diffused over adjoining land, was conceded arguendo in *O'Brien v. City of St. Paul*, 25 Minn. 331, 33 Am. Rep. 470. Without determining whether that right may not be qualified by the circumstances of particular cases, we are prepared to say that that is as far as it is safe to go, and that it does not include the right to gather the surface waters on one's land and turn them upon the land of another, to its damage, even though the former land may as a consequence thereof be improved. In other words, he may not in this way improve his own land, by merely transferring to the land of another a burden which nature has imposed on his own land."

In *Brandenburg v. Zeigler*, 62 S. C. 18, 89 Am. St. Rep. 887, 39 S. E. 792, it is said: "When one having the right to

cut off surface water from his land nevertheless permits such water to collect in a natural basin on his land, he has an absolute right ⁶⁴² of property in such water, and may use it exclusively as his own. His dominion over such water is as great as his dominion over the realty upon which it rests, and of which it is a part. He can no more cast such water, by artificial means, injuriously upon his neighbor, than he could cast the mud or soil upon his neighbor's premises. In either case he would violate the neighbor's right of dominion over his own property. The absolute right of the lower proprietor to embank against the flow of surface water, and thereby cause it to rest upon the upper proprietor's land, is wholly irreconcilable with the claimed right of the upper proprietor by artificial means to collect and cast such water upon the lower proprietor."

The cases quoted from are from states adopting the rule of the common law. The cases cited above from states adopting the civil-law rule are to the same effect. When these waters are accumulating in Long lake they are, under the rule announced in *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113, a common enemy, against which anyone may defend himself; but when they are permitted to accumulate in the basin which forms the lake on appellants' land they become a part of the land, and the appellants have the exclusive use and control thereof, but they may not shift the same from one part of their land to another, to the material injury of their neighbor. The fact that the waters are not accumulated by means of artificial ditches into the main body of the lake, but do accumulate there by natural means, can make no difference. When the waters are confined by natural barriers, so that the same do not run from such confinement naturally, the appellant may not construct a ditch on his own land so as to cast the waters which do not naturally pass therefrom on to his neighbor, to the material injury of such neighbor. This rule is not in conflict with the rule announced in *Cass v. Dicks*, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113, but is in consonance with it, and is in accord with the great weight of authority.

⁶⁴³ The judgment of the lower court in restraining the appellants from constructing the ditch through the barrier on their own land, and thereby casting waters onto the lands of the respondents to their injury, was right, and the judgment is therefore affirmed.

Reavis, C. J., and Anders, Hadley, Fullerton, Dunbar and White, JJ., concur.

Land Containing a Pond of Surface Water cannot be drained by means of a ditch on the lands of a lower proprietor, to his injury, without liability in damages: *Brandenberg v. Zeigler*, 62 S. C. 18, 89 Am. St. Rep. 887, 39 S. E. 790. See the monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 726-735, on accelerating or increasing the flow of surface water; *Sanguinetti v. Poek*, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98; *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336, 89 Am. St. Rep. 817, 64 N. E. 4; *Jessup v. Bamford Bros. Silk Mfg. Co.*, 66 N. J. L. 641, 88 Am. St. Rep. 502, 51 Atl. 147.

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CARRIERS.

1. **RAILROADS—Liability of Connecting Carriers.**—If a passenger has received from the initial carrier a number of coupon tickets, one for his passage over the road of the first carrier, and the others as passports over the lines of succeeding and connecting carriers, the first carrier or its agent selling such tickets is the agent for the connecting carrier, and the latter is liable for negligent injury to such passenger while traveling upon its line. (Ala.) *Kansas City etc. R. R. Co. v. Foster*, 25.

2. **RAILROADS—Wrongful Ejection of Passenger.**—If, by mistake of an officer or agent of a railroad company a passenger is not furnished with a proper ticket evidencing his right to be carried to his destination, for which he has paid, his right still remains, and if, for want of the requisite evidence of such right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and the passenger has a complete right of action for all damages resulting from such breach. (Ala.) *Kansas City etc. R. R. Co. v. Foster*, 25.

3. **RAILROADS—Wrongful Ejection of Passenger—Measure of Damages.**—The measure of damages to a railroad passenger who, buying a ticket to one place, is given a ticket to a less distant place, where he is ejected, is not confined to the mere cost of transportation from the point of ejection to the point of destination to which he has paid. His damages may also include compensation for indignities placed upon him, as well as for the pain and suffering of both body and mind resulting from the wrongful act. (Ala.) *Kansas City etc. R. R. Co. v. Foster*, 25.

See Railroads; Street Railways.

CASUALTY INSURANCE.

See Insurance, 17, 19.

Caveat Emptor, exceptions to rule of, 515.

landlord and tenant, rule of, when applies between, 509, 510.

rule of, when applies to third persons in favor of lessors, 510.

CERTIORARI.

1. **CERTIORARI—Judicial Acts, What are.**—Whenever an act determines a question of right, or of obligation, or of property, as the foundation upon which it proceeds, such act is to that extent judicial. (Wash.) *Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co.*, 907.

2. **CERTIORARI may Issue from the Supreme Court** to review an adjudication of a subordinate court on the question of a public use or necessity in a proceeding under the eminent domain act, where the statute does not authorize an appeal in such a proceeding, except for the purpose of questioning the propriety and justness of the damages, and the constitution of the state gives the supreme court appellate jurisdiction in all actions and proceedings other than those wherein the amount in controversy, or the value of the property, does not exceed two hundred dollars and power to issue writs of certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. (Wash.) *Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co.*, 907.

CHASTISEMENT OF CHILD.

See Homicide, 1.

CHILDREN.

See License; Negligence, 5, 6; Street Railways.

COMPROMISE AND SETTLEMENT.

COMPROMISE—Waiver of Right to Insist upon.—If a stockholder in a corporation makes an agreement with its attorneys to compromise its claim for unpaid subscriptions to its stock, and pays in pursuance of such compromise, but on being informed that the agents of the corporation had been advised that the compromise was ultra vires and void, and that the amount received would be returned, accepts payment of such amount, though declaring that he did not wish it returned, such acceptance and the retention of the moneys amount to a waiver of his right to insist upon the compromise. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

CONDITIONS SUBSEQUENT.

See Deeds, 4-10.

CONFESSIONS.

See Criminal Law, 4.

CONFLICT OF LAWS.

See Husband and Wife, 5; Insurance, 5; Judgments; Limitation of Actions; Master and Servant, 22.

CONSPIRACY.

1. CONSPIRACY — Evidence. — Proof of an agreement, understanding, or design to actually kill the deceased is not necessary to connect the accused with the crime as a conspirator, because if he was a party to a conspiracy to merely shoot and maim the deceased without killing him, and his death followed as the direct, proximate and natural result of a shooting in the accomplishment of such conspiracy, the responsibility of the accused extends to the consequences, though not intended by him, and renders him liable to a conviction of manslaughter in the first degree at least, (Ala.) *Ferguson v. State*, 17.

2. CONSPIRACY — Evidence — Subsequent Happenings. — The accomplishment of the object of a conspiracy necessarily ends the conspiracy, and subsequent happenings are not evidential of a past conspiracy unless they are such as, under all of the circumstances, may afford ground for inference that such conspiracy had existed. (Ala.) *Ferguson v. State*, 17.

3. CONSPIRACY may be Established by Evidence Wholly Circumstantial and without proof of an express agreement between the conspirators. (Ala.) *Ferguson v. State*, 17.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—Statute Limiting Hours of Employment of Females.—A statute providing that no female shall be employed in any mechanical or mercantile establishment, laundry, hotel, or restaurant, in this state more than ten hours during any day, is constitutional. (Wash.) *State v. Buchanan*, 930.

2. APPELLATE PROCEEDINGS, Power of the Legislature to Deny.—When the supreme court is by the constitution vested with appellate jurisdiction, the legislature cannot impair or destroy it as to any specific case by the failure to provide therefor, and such court may, in such case, bring the proceedings before it for review by issuing a writ of certiorari. (Wash.) *Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co.*, 907.

3. CONSTITUTIONAL LAW—Vested Right to Defense.—A statute providing that, in an action against a railroad company for injuries sustained by an employé in another state, it shall not be competent for the company to plead or prove the statutes or decisions of the latter state as a defense, is unconstitutional. (Ind.) *Baltimore etc. Ry. Co. v. Reed*, 293.

4. CONSTITUTIONAL LAW.—A Vested Right of Defense, as well as a vested right of action, is, in a sense, property, and is protected from being taken away by the legislature. (Ind.) *Baltimore etc. Ry. Co. v. Reed*, 293.

5. CONSTITUTIONAL LAW.—The Right of Contracting as one sees fit stands untrammelled, as a general rule; but the state may restrict this right in the interest of public health, morals, and the like. (Ind.) *Davis Coal Co. v. Pollard*, 319.

6. CONSTITUTIONAL LAW.—A Statute Requiring Mine Owners to make provisions for the safety of their employés is not class legislation. (Ind.) *Davis Coal Co. v. Pollard*, 319.

7. **CONSTITUTIONAL LAW**.—To Classify Legislation by distinctions that naturally inhere in the subject matter is not to indulge in class legislation. (Ind.) *Davis Coal Co. v. Polland*, 319.

8. **CONSTITUTIONAL LAW**—Stocks, Purchase of on Margin, Provisions Declaring Invalid.—The provision of the constitution of California declaring that all contracts for the sale of shares of the capital stock of any corporation or association on margin to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it, does not conflict with section 1 of the fourteenth amendment to the constitution of the United States. (Cal.) *Parker v. Otis*, 56.

See Elections; Eminent Domain; Municipal Corporations; Statutes.

Constitutional Law, arbitrary restrictions of business by the states—what cannot be permitted, 66.

stocks, sales of on margin, states may prohibit, 66-68.

See Jeopardy.

CONTRACTS.

1. **CONTRACTS in Restraint of Trade**.—An agreement entered into by merchants to close their places of business at a certain hour each day for a limited period of time is valid and based upon a sufficient consideration, both from a financial and social or healthful standpoint. (Ky.) *Stovall v. McCutchen*, 373.

2. **CONTRACTS in Restraint of Trade**.—An agreement between merchants to close their places of business at a certain hour each day for a limited period is not illegal as in restraint of trade. (Ky.) *Stovall v. McCutchen*, 373.

See Assignment.

CONTRIBUTION.

See Principal and Surety.

CORPORATIONS.

1. **A CORPORATION Cannot Avail Itself of the Defense of Ultra Vires** when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance of the contract. (N. Y.) *Vought v. Eastern Bldg. etc. Assn.*, 761.

2. **CORPORATIONS**—Personal Liability for Assessments.—If the statutes under which a corporation was organized provide that the memorandum of association shall bind members to the same extent as if each had signed it, and that all moneys payable by any member in pursuance of the conditions and regulations of the company shall be deemed a debt due from him to it, and the articles declare that the directors may, from time to time, make such calls as they think fit, upon members, in respect to moneys unpaid on their shares, and that each shall pay the amount of the call so made on him to the persons and at the times and places appointed by the directors, each member must be regarded as having personally promised to pay such calls, and an action therefor may hence be sustained against him. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

3. CORPORATION—Waiver of Stockholder's Right to Object Before Paying Assessments that all the Stock has not been Subscribed for.—If the memorandum of association of a corporation, while providing the whole amount of its capital stock, declares that the first issue shall be a lesser amount, a stockholder receiving part of such lesser issue waives the right to object, in an action to recover assessments, that all the stock has not been subscribed for. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

4. CORPORATIONS—Calls for Unpaid Assessments—Reasons for Need not be Shown.—The defendant, in an action to recover assessments on stock owned by him and not fully paid up cannot successfully defend on the ground that no necessity therefor is shown. The necessity or wisdom of the assessment, when it is within the power of the directors to make it, cannot be controverted by the stockholders, at least in the absence of fraud. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

5. CORPORATIONS—President, Authority of to Make an Assignment.—The Fact that the President of a Corporation Owns a Large Majority of Its Capital Stock does not give him power to execute in its behalf an assignment for the benefit of its creditors. (Ill.) *Friedman v. Leshner*, 255.

6. CORPORATIONS—Assignment for the Benefit of Creditors of. Neither the president, vice-president, nor any other officer of a corporation has authority to make an assignment in its behalf for the benefit of its creditors unless previously authorized by resolution of its board of directors. (Ill.) *Friedman v. Leshner*, 255.

7. CORPORATIONS—Purchase of Stock on Margin, What is.—The payment to brokers of certain moneys, accompanied by an order to purchase certain stocks, their subsequent purchase in the stock board at the full market price by such brokers, they crediting the parties furnishing the money with the amount thereof, which was always less than the purchase price, and by agreement holding the stocks as security for their commissions, advances, and for accumulated interest thereon, with power to sell the stocks to protect themselves against a decline in value, they not keeping the particular stocks purchased, but always having on hand others of like character of which they could and would have delivered a like number of shares on demand, on payment of the balance due, is a purchasing of stocks on margins. (Cal.) *Parker v. Otis*, 56.

8. CORPORATIONS—Evidence of Sales of Stock of, What Sufficient.—Where an action is to recover moneys on the sales of stock in corporations, on a margin, the fact that there is no direct evidence of the existence of any corporation, or that the stocks mentioned in the complaint were shares of the capital stock thereof, will not defeat the plaintiff's right to recover, if it appears that moneys were paid to the defendants for the purchase of "stocks," that stocks were purchased by the defendants in the Pacific Stock Exchange, that in statements rendered by the defendants they referred to and designated certain stocks by name, and that, in a written agreement, it was stipulated that defendants would act as brokers and agents for the purchase and sale of stocks and bonds of their principal. (Cal.) *Parker v. Otis*, 56.

9. FOREIGN CORPORATIONS.—An Assessment Made by a Foreign Corporation, on shares not fully paid up, may be collected by it in the courts of this state of stockholders here residing. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

10. FOREIGN CORPORATIONS—Actions by to Recover Assessments.—The objection that the plaintiff's remedy to collect assessments on the stock of a foreign corporation is only by sale of such stock is removed by the fact that the defendant has impliedly or expressly agreed to pay any assessments which might be made. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

Corporations, stocks, sales of on margin, may be prohibited, 66-68.

See Building and Loan Associations; Constitutional Law, 8.

COSTS.

COSTS, Error Respecting—How to be Reviewed.—Unless plaintiff appeals from the judgment of the trial court allowing costs, the appellate court cannot consider them, though he files a bill of exceptions. (Conn.) *Carney v. Hennessey*, 199.

See Principal and Surety, 4.

COUNTERCLAIM.

See Setoff and Counterclaim.

COURTS.

ELECTION—Proceeding in Probate Court—When does not Bar Proceeding in Equity.—Resorting to the probate jurisdiction to prove a claim against the estate of a deceased person is not an election to choose the equity side of the same court to enforce the equitable ownership of money in the hands of the administrator of the estate against which the claim is offered. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

See States.

Covenant to Repair, landlord is not liable under until he receives notice of defects, 507, 508.

liability of landlords to third persons, whether created by, 504, 507.

made by lessee, whether relieves landlord from liability to third persons, 516, 517.

CREDITORS' BILL.

CREDITORS' BILL to Reach Satisfied Obligation.—A suit in equity cannot be sustained to reach an obligation and apply it to the satisfaction of the plaintiff's demand, if such obligation had been discharged before the suit was commenced. (Mass.) *Bain v. Atkins*, 411.

CRIMINAL LAW.

1. TO CONSTITUTE SUICIDE, the person must be of years of discretion and of sound mind. (N. Y.) *Weber v. Supreme Tent*, etc., 753.

2. CRIMINAL TRIALS—Identity of Accused.—If an accused is indicted as "Buck Ferguson, alias Buck Ferguson," and his appearance bond bears the signature of "W. B. Ferguson," while in the order setting the day for trial the case is styled as "The State v. W. B. Ferguson," and contains a recital to the effect that "the defendant, W. B. Ferguson, alias Buck Ferguson," was then present in open court, this sufficiently shows that the accused named in the

indictment was in court when his case was set for trial. (Ala.) *Ferguson v. State*, 17.

3. CRIMINAL LAW—Accessaries—Proof of Guilt of.—The guilt of a person accused of a felony may be established by proof that he contributed to the criminal result by words or acts intended and calculated to incite or encourage its accomplishment, whether he was present at its consummation or not. It is not essential to the incrimination of one so participating in a criminal act that it be done in respect to time, place or mode according to any prearranged or instigated plan. (Ala.) *Ferguson v. State*, 17.

4. EVIDENCE.—Confessions of the Accused Made After Several Days' Confinement in a Sweat-box, excluded from light or air, are not admissible in evidence against him. (Miss.) *Sweat-box Case*, 607.

5. PLEA of Former Conviction is a collateral civil inquiry, and the burden of proof is upon the person offering it. (N. C.) *State v. Ellsworth*, 790.

6. PLEA of Former Conviction.—Verdict in favor of the accused on plea of former conviction contrary to the weight of the evidence, must be set aside and a new trial ordered. (N. C.) *State v. Ellsworth*, 790.

7. PLEA of Former Conviction—Order Setting Aside Verdict—Appeal.—No appeal lies from an order setting aside the verdict on a trial of a plea of former conviction prior to the trial on the merits. (N. C.) *State v. Ellsworth*, 790.

8. PLEA of Former Conviction—Former Jeopardy.—Trial of a plea of former conviction prior to the trial on the merits is a mere interlocutory proceeding, and not the subject of a subsequent plea of former jeopardy. (N. C.) *State v. Ellsworth*, 790.

9. PLEADING a Conviction of a Lesser Offense Involved in a Greater.—To a prosecution for an assault with a deadly weapon with intent to commit murder, the defendant is entitled to plead and prove, as a complete bar, his previous conviction, sentence, and punishment for the crime of battery growing out of the identical facts on which the present prosecution is based. (Cal.) *People v. McDaniels*, 81.

10. CRIMINAL LAW—Former Jeopardy.—If the trial of the accused for a misdemeanor, upon issue joined on plea of not guilty, proceeds to the conclusion of the evidence and reaches the stage calling for a judgment of the court on the issue as made, he is placed in jeopardy, and the court has no jurisdiction to bind him over to a higher tribunal to answer for a greater offense for the same act. (Ala.) *State v. Blevins*, 22.

See Evidence; Jeopardy; Trial.

CURTESY.

REVERSIONER—Life Tenant Cannot Bind.—A tenant by the curtesy in possession has no authority to represent the reversioner, or to bind him in any manner whatever. A sale of trees made by such tenant is, therefore, void. (Miss.) *Learned v. Ogden*, 621.

CUSTODY OF CHILD.

See Parent and Child.

DAMAGES.

DAMAGES, Punitive.—If one claiming lands under a tax title enters thereon and commits such acts of trespass as evince a determination to enforce his claim, whether good or bad, at any hazard, punitive damages may properly be awarded against him. (Miss.) *Howell v. Shannon*, 609.

See **Assault and Battery**; **Death**; **Injunction**, 5; **Master and Servant**; **Sales**; **Telegraphs and Telephones**.

DANGEROUS PREMISES.

See **Negligence**, 4-6.

DEATH.

1. **DEATH OF HUMAN BEING**.—Action for Where He has no Heirs.—Under a statute declaring that an action may be brought by the heirs of a decedent or his personal representative to recover for his death when due to the negligence of another, an action cannot be sustained by a personal representative unless the decedent left heirs at law. (Cal.) *Webster v. Norwegian Min. Co.*, 181.

2. **PRESUMPTION OF SURVIVORSHIP**.—When two or more persons lose their lives in a common disaster, there is not, at the common law, any presumption of survivorship whatever, and if survivorship is claimed it must be proved, and the one having the burden of proof must fail if he cannot prove it. (Ill.) *Middeke v. Balder*, 284.

3. **SURVIVORSHIP When Several Persons Perish in a Common Disaster**.—Where several persons perish in a common disaster, and there is no evidence tending to show who died first, all are treated as having died at the same instant, and no one of them takes from any of the others by reason of the other's death. (Ill.) *Middeke v. Balder*, 284.

4. **EVIDENCE**—There is no Presumption of Survivorship in Case of a Common Calamity.—He who claims a right by virtue of such survivorship must prove the fact of the survival of him through whom he claims. (Mo.) *United States Casualty Co. v. Kacer*, 641.

See **Abatement and Revivor**.

DEEDS.

1. **DEED—Delivery of**.—If a deed made by a wife to her husband is signed and acknowledged by her, and handed to him with the understanding between them that if she survives him it is to be destroyed, and the title remain in her, but if he survives her, it should, after her death, be placed on record, she, however, retaining no right to control the deed, and his having it at all times in his possession, there is sufficient delivery to vest title in him, at least upon the event of her death. (Mich.) *Dyer v. Skadan*, 461.

2. **APPURTENANCES** are Things Belonging to Another Thing as Principal, and which pass as incidents to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto and are a part of the realty. (Wash.) *Sherrick v. Cotter*, 821.

3. **ESTATE FOR LIFE**—Conveyance, When Restricted to.—Under the statute of Connecticut a conveyance to a grantee for life,

and at his decease to his heirs, is ineffectual to convey anything except a life estate to his grantee. (Conn.) *Lewis v. Lewis*, 240.

4. CONDITIONS SUBSEQUENT—Conveyances, When upon.—A conveyance which purports to be in consideration that the grantee and his successors in interest will furnish the grantor board and washing during his lifetime, and will, without unnecessary delay, remove to and occupy the premises conveyed and continue to do so during such life, and that the grantee and his successors will convey no part of the property during the lifetime of the grantor, gives the grantee an estate upon conditions subsequent. (Conn.) *Lewis v. Lewis*, 240.

5. CONDITIONS PRECEDENT and Subsequent.—As between conditions precedent and subsequent, the law favors the latter. (Conn.) *Lewis v. Lewis*, 240.

6. CONDITIONS SUBSEQUENT, What are.—If an act or condition required does not necessarily precede the vesting of an estate, or may accompany and follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act required to be performed and the time required to perform it, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent. (Conn.) *Lewis v. Lewis*, 240.

7. THE BREACH of a Condition Subsequent does not Ipso Facto Revest the estate in the grantor. To such revesting it is necessary that the grantor or his proper substitute take advantage of the condition by re-entry for a breach thereof. (Conn.) *Lewis v. Lewis*, 240.

8. CONDITIONS SUBSEQUENT—Breach of Need not be Negatived in Pleading.—In suing to recover possession of real property by one who holds it under a conveyance on condition subsequent, it is not necessary for him to show performance of the condition. If the plaintiff alleges title in himself, he must recover on demurrer, unless his complaint also shows facts essential to the revesting of the title in the grantor. (Conn.) *Lewis v. Lewis*, 240.

9. CONDITIONS SUBSEQUENT—Waiver of Breach of.—If a conveyance is upon a condition that the grantee will provide board and washing for the grantor on the premises conveyed, the voluntary leaving of them by the grantor is a waiver of his rights, and does not create any right on his part or that of his successors in interest to terminate the estate for breach of the condition. (Conn.) *Lewis v. Lewis*, 240.

10. CONDITIONS SUBSEQUENT—Estoppel to Urge.—One who participates in acts amounting to a breach of a condition subsequent cannot avail himself of such breach to claim a forfeiture of the estate. (Conn.) *Lewis v. Lewis*, 240.

See Escrow; Insane Persons; Infants.

DEVISES.

See Wills.

DIVORCE.

1. DIVORCE AND ALIMONY—Ground for.—An offer by a husband to strike his wife, coupled with foul and unjust accusations often repeated, a withdrawal of intercourse, refusal to bed with her,

and an express charge of the illegitimacy of the children of the marriage, is ground for a divorce from bed and board, with alimony for the support of the wife. (N. C.) *Green v. Green*, 788.

2. **DIVORCE.—Evidence** of the acts of the husband within six months before the commencement of an action for divorce by his wife is incompetent and inadmissible. (N. C.) *Green v. Green*, 788.

3. **DIVORCE—Injunction Against.**—If husband and wife have their matrimonial domicile within the state where she resides, she may there enjoin her husband from prosecuting a suit for divorce in another state, based on a false allegation of his residence in that state, and if the injunction is served on the husband personally in another state before he is brought into court by appearance, process, or publication, he is bound to obey the injunction, and is punishable for disobedience. (N. J. Eq.) *Kempson v. Kempson*, 682.

4. **ALIMONY—Bankruptcy.**—A judgment for alimony is final, and being provable against the estate of a bankrupt, is discharged by his discharge in bankruptcy. (N. C.) *Arrington v. Arrington*, 769.

DOGS.

See Animals.

DOMICILE.

DOMICILE Cannot be Controlled by Intent Merely. Hence one who is present with his family in a house in one town, and intends to make his actual headquarters there for the rest of his life and to live no more in the town of his former domicile, cannot retain his old domicile by merely intending and desiring so to do and by voting there. (Mass.) *Dickinson v. Inhabitants of Brookline*, 407.

DOWER.

1. **DOWER—Voluntary Partition.**—If lands are voluntarily partitioned between joint tenants, the inchoate right of dower of the wife of one of them attaches only to the land received by him under the deed of partition. (Ky.) *Napper v. Mutual Life Ins. Co.*, 340.

2. **DOWER, Wills Barring.**—When a testator devises his real property to trustees until his youngest child becomes of age, and directs that one-third of the net income be paid to the widow and the balance expended for the support and education of his children, and upon the expiration of the trust one-third to be conveyed to the widow during her life or widowhood, and the residue to his children, and authorizes the trustees to sell the real estate and invest the proceeds there is a manifest incompatibility between the provisions of the will and a claim for dower. (N. Y.) *Matter of Gorden*, 689.

3. **DOWER—Legacy, When not Presumed to be in Lieu of.**—Before it can be presumed that a legacy was given in lieu of dower, it must appear by the will, either expressly or by implication, that such was the testator's intent, and such intent is not shown by implication where there is no provision of the will clearly inconsistent with the assertion of the right of dower. (Conn.) *Thompson v. Betts*, 235.

See Husband and Wife, 3.

Dower. bar of by widow's failure to elect between and the provisions of the will, 703.

conflict of laws respecting, 704, 705.

Dower, defeat of, by accepting testamentary provisions, 696.
 devise of income for life puts the widow to her election, 700.
 devise of property to be held during widowhood, whether puts a widow to her election, 700.
 devise to a widow for life is not inconsistent with, 699.
 devise to trustees to sell does not require widow to elect, 701.
 devise to widow and minor children, whether puts her to her election, 701.
 election on the part of the widow, when compellable, 697, 699.
 election, what devises and bequests require a widow to exercise her right of, 702.
 express provisions in wills putting widows to their election, 697.
 is favored by the courts, 698.
 statutory enactments affecting the right of widows to claim, 703, 704.

EASEMENTS.

1. **A RIGHT OF WAY by Necessity is Extinguished** upon a unity of title to the dominant and servient estate in one owner, although the way is still used by him, and a subsequent conveyance of the servient estate with express waiver of such right of way constitutes a surrender of the right, otherwise existing as a "right of way of necessity. (Ky.) *Lebus v. Boston*, 333.

2. **WAYS BY NECESSITY—Evidence of Surrender of.**—Parol evidence that a grantor expressly waived a right of way over land conveyed is admissible to rebut a claim of an implied reservation of such way as an easement of necessity. (Ky.) *Lebus v. Boston*, 333.

EJECTMENT.

See Railroads.

Election, widows, when required to exercise between and the provisions of their husbands' wills, 696-705.

See Courts.

ELECTIONS.

1. **SUFFRAGE.—A Statute Limiting the Right of Suffrage** as to the business and financial affairs of villages to the taxpayers of the municipality does not violate the article of the constitution defining the general qualifications of the electors of the state. (N. Y.) *Spitzer v. Village of Fulton*, 736.

2. **CONSTITUTIONAL LAW—Public Officers—Extending Terms by Postponing the Time for the Election of Their Successors.**—An act amending the charter of a city, and thereby fixing such a time for the next election of officers that the terms of those in office must necessarily be prolonged, does not operate as an appointment of officers by the legislature, and is not unconstitutional. (Mich.) *Common Council of Detroit v. Schmid*, 468.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—Right of One Railroad to Condemn the Right of Way of Another.**—Under a statute authorizing a railway corporation to appropriate all land, real estate, and other property necessary for the construction of its road, one railway corporation may acquire a right to use such part of the right of way of another

as is not necessary for the exercise of the corporate franchise of the latter, as where the tracks of both roads may be constructed, maintained, and operated practically and with reasonable safety after appropriating part of the right of way of the one for the use of the other.' (Wash.) *Seattle etc. R. R. Co. v. Bellingham Bay etc. R. R. Co.*, 907.

2. **EMINENT DOMAIN—Taking Possession During Pendency of the Proceedings.**—A statute authorizing the court in which a proceeding is pending to make an order authorizing the plaintiff to take possession of and use lands and premises sought to be condemned during the pendency and until the final conclusion of the proceeding brought to condemn on paying into court, or giving security for the payment thereof, to be approved by the court, of a sum sufficient to compensate the defendant in case the land is finally taken, or for damages if for any reason the land is not taken, and providing that the defendant may apply to the court for the money, but that its payment to him is an abandonment of all defenses except the claim for greater compensation, is unconstitutional, if the state constitution declares that private property shall not be taken or damaged for a public use without just compensation having been first made or paid into court for the owner. (Cal.) *Steinhart v. Superior Court*, 183.

3. **EMINENT DOMAIN — Taking of Property, What is.**—The taking possession of and using property during the pendency of a proceeding for its condemnation for a public use is a taking of the property within the meaning of a constitutional provision declaring that property shall not be taken or damaged for a public use without just compensation having been first made or paid into court for the owner. (Cal.) *Steinhart v. Superior Court*, 183.

4. **EMINENT DOMAIN — Fourteenth Amendment.**—The provision of the constitution of California declaring that property shall not be taken or damaged for a public use without just compensation having been first made to, or paid into court for, the owner, and that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor is first made in money, or ascertained and paid into court, irrespective of any benefit, for any improvement proposed by such corporation, is not in conflict with the fourteenth amendment to the constitution of the United States. (Cal.) *Steinhart v. Superior Court*, 183.

5. **EMINENT DOMAIN—Right to Condemn a Right of Way to be Transferred to Another.**—One not Himself in Charge of a Public Use, nor intending to perform a public service, cannot maintain a proceeding to condemn a right of way for a railway, though he intends, and is under contract, to convey such right of way to a railway corporation which would have been authorized to maintain the proceeding in its own name. (Cal.) *Beveridge v. Lewis*, 188.

6. **EMINENT DOMAIN—Fourteenth Amendment.**—The provision of the constitution of California declaring that property shall not be taken or damaged for a public use without just compensation having been first made to, or paid into court for, the owner, and that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor is first made in money, or ascertained and paid into court, irrespective of any benefit, for any improvement proposed by such corporation, is not in conflict with the fourteenth amendment to the constitution of the United States. (Cal.) *Beveridge v. Lewis*, 188.

7. **EMINENT DOMAIN — Discriminations Against Corporations.** Under a constitution requiring the uniform operation of general

laws and prohibiting discriminations not justifiable by intrinsic differences, the legislature cannot provide that the owner of land which is to be taken for a public use shall receive a smaller sum when it is taken by a natural person than when it is taken by a corporation for precisely the same use. (Cal.) *Beveridge v. Lewis*, 188.

8. EMINENT DOMAIN—General and Special Benefits, What are.—General benefits consist in the increase in value of, land common to the community generally from advantages which will accrue to the community from the improvement. Special benefits are such as result from the mere construction of the improvement and are peculiar to the land in question. (Cal.) *Beveridge v. Lewis*, 188.

EQUITY.

1. EQUITY PRACTICE in Dismissing a Bill.—Where a bill is dismissed in equity for want of jurisdiction, on the ground that an adequate remedy at law exists, the court should not incorporate in its decree a finding of facts which may have the effect of prejudicing the case if an action should be brought at law. (Ill.) *Vannatta v. Lindley*, 270.

2. EQUITY has no Jurisdiction to command a person to do what he has no power to do. (N. J. Eq.) *Kempson v. Kempson*, 682.

Equity, forged bonds, jurisdiction of to cancel, 273.

 forged deeds, jurisdiction of to cancel, 274, 275.

 forged instruments, jurisdiction of to cancel, 272.

 forged marriage contracts, jurisdiction of to cancel, 274.

 forged negotiable instruments, jurisdiction of to cancel, 273.

ESCROW.

ESCROW—A Deed Cannot be Delivered in Escrow to the Grantee.—Where there is a valid delivery of a deed by the grantor to the grantee, it is impossible to annex a condition to such delivery, and it vests title in the grantee, although this may be contrary to the intention of the parties. (Mich.) *Dyer v. Skadan*, 461.

ESTATE OF DECEDENT.

See Executors and Administrators.

ESTOPPEL.

ESTOPPEL.—One Who Leases a Piano to Another Having a Retail Store and Keeping Musical Instruments for Sale does not thereby give the lessee any authority to sell it, nor estop himself from recovering the piano from one who bought it from the lessee in good faith and for a valuable consideration in the belief that he owned it. (Mass.) *Oliver Ditson Co. v. Bates*, 424.

EVIDENCE.

1. EVIDENCE.—Judicial Notice cannot be taken that sowing oats or planting corn in a young orchard is not good care or husbandry, nor that good care will make poor varieties of trees bear good fruit. (Mich.) *Long v. Pruyn*, 443.

2. EVIDENCE.—Statutes of a Foreign Country may be proved by a copy, proved to be a true copy by a witness who has examined and compared it with the original. (Mass.) *Anglo-American Land etc. Co. v. Dyer*, 437.

3. **EVIDENCE—Parol to Vary Note.**—A promissory note, executed contemporaneously with a writing showing that the note was given for a scholarship, the course of study to be entered upon at about the date of the note's maturity, and the scholarship to be transferable, cannot be contradicted by parol evidence that it was not to be paid if the maker should not attend the school, and could not sell the scholarship. (N. Y.) *Jamestown Business College Assn. v. Allen*, 740.

4. **EVIDENCE—Parol to Vary Writing.**—Evidence of what was said between the parties to a writing, either before or at the time of its execution, cannot be received to vary or contradict its terms, except to show that a writing which purports to be a contract is in fact no contract, or to complete the entire contract of which the writing is only a part. (N. Y.) *Jamestown Business College Assn. v. Allen*, 740.

5. **WILLS.—An Expert in Handwriting Cannot Give an Opinion** to the effect that perpendicular marks drawn across the letters of the signature of a will were not made by the same person who wrote the signature. (N. Y.) *Matter of Hopkins*, 746.

6. **EVIDENCE of the Value of Land — What Sufficient.**—Where there is some testimony showing the opinion of a witness of the value of land as to how much it would have been enhanced by the addition of trees of a variety ordered of the defendant, and of what such trees would, ordinarily, produce, there is sufficient evidence to enable the jury to determine how much the value of the land would have been augmented had trees been furnished of the varieties ordered. (Mich.) *Long v. Prunyn*, 443.

7. **EVIDENCE of the Value of Land.**—The fact that a witness does not know of any sales of fruit lands does not render him incompetent to testify to their value. (Mich.) *Long v. Prunyn*, 443.

8. **EVIDENCE—Hearsay as to Symptoms and Sufferings of the Plaintiff.**—A physician called to testify as an expert may state the symptoms and sufferings of the plaintiff as described by him, though made long after the injuries for which he seeks to recover were received, such statements being part of the grounds on which the expert has reached the conclusion which he is permitted to state to the jury. (Mass.) *Cronin v. Fitchburg etc. Ry. Co.*, 408.

9. **PRINCIPAL AND AGENT.**—The Declarations and Acts of an agent are evidence against his principal if made while executing an authority conferred upon him and relating to his business and within the scope of his authority. (Conn.) *Carney v. Hennessey*, 199.

10. **EVIDENCE.**—The Declaration of an Owner of Property as to Where he Intended to draw the line of a lot conveyed by him is inadmissible as against his grantees and their successors in interest. (Conn.) *Carney v. Hennessey*, 199.

11. **EVIDENCE.**—The admissions of an agent should not be excluded from evidence on the ground that the principal is not bound by them unless he had knowledge of them. (Conn.) *Carney v. Hennessey*, 199.

12. **EVIDENCE — Res Gestae.**—A declaration made by a wife shortly after the shooting of a man by her husband in the nature of an endearing expression toward the man shot is not a part of the res gestae, and therefore not admissible in favor of the husband. (Conn.) *State v. Yanz*, 205.

13. **CRIMINAL LAW — Res Gestae.**—An accused is not entitled to exculpate himself by bringing evidence of his own acts and

declarations, when not a part of the *res gestae*, or of some transaction or conversation partially developed by the prosecution. (Ala.) *Ferguson v. State*, 17.

14. **CRIMINAL LAW — Opinions — Evidence.**—In criminal cases, questions calling merely for the opinion of the witness are inadmissible. (Ala.) *Ferguson v. State*, 17.

15. **EVIDENCE—Criminal Conviction as.—A Judgment of Conviction Entered on a Plea of Guilty to an affidavit charging the defendant with an assault and battery committed "willfully, maliciously, and unlawfully" is admissible in a civil action to recover for the same battery, because such plea, though not conclusive for want of mutuality, is competent as an admission of a solemn character made by the accused, and may support an award of punitive damages.** (Miss.) *Wagner v. Gibbs*, 598.

See Criminal Law; Homicide; Waste; Witnesses.

EXCHANGES.

1. **STOCK EXCHANGE—Seat in as Property.**—A seat in a stock exchange, which has a pecuniary value, may be transferred under restrictions, and upon the member's death can be transferred by a committee by sale, the price, after extinguishing all claims of other members, going to the legal representatives of the decedent, is property, and may be dealt with as such. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

2. **A SEAT in a Stock Exchange may be Pledged, and as it is not susceptible of delivery, the instrument need not be recorded, and the lien can be enforced without foreclosure as of a mortgage of personalty.** (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

3. **LIEN OF PLEDGEE—When does not Secure Subsequent Indebtedness.**—An assignment of a seat in a stock exchange which declares that it shall remain in force until all indebtedness of the assignor to the assignee is paid, does not secure indebtedness subsequently contracted. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

4. **PLEDGE OF SEAT in Stock Exchange — Lien of Extends to the Proceeds.**—When a sale is made of a seat in a stock exchange by its officers, which is subject to a pledge, and the amount realized is paid to the administrator of the pledgor, this change of the property into money is like the conversion of mortgaged land into money by a foreclosure or sale, and the lien is transferred to the proceeds of the sale. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

EXECUTION.

1. **EXECUTIONS — Jurisdiction to Compel Payment of Money into Court.**—The court has jurisdiction to compel money raised by execution issued by it and naming the payee to be brought into court for distribution, and from an order made for that purpose no one suffers an appealable grievance. Such order may be obtained without written pleading or proof upon notice to the interested parties. (N. J. Eq.) *Gifford v. McGuinness*, 686.

2. **AN EXECUTION Lien Attaches to all the Property of the Defendant Subject to Execution** when it comes into the hands of the sheriff, and has precedence over an assignment for the benefit of creditors, which has not before that time become legal and perfect, so as to vest title in the assignee. (Ill.) *Friedman v. Leshner*, 255.

3. RATIFICATION of an Unauthorized Act, Though in Other Respects It Relates Back to the Date of Such Act, Cannot do so to the Prejudice of Intervening Rights. Hence the ratification of an unauthorized assignment for the benefit of creditors cannot give it precedence over the lien of an execution received by a sheriff before such ratification by the making of the unauthorized assignment. (Ill.) *Friedman v. Leshner*, 255.

4. EXECUTION SALE to Attorney of Defendant—Presumption as to Furnishing of Moneys.—If, after a sale of property under execution, the attorney of the defendant, with his consent, takes an assignment of the certificate of sale, no presumption arises that the consideration of the assignment was not furnished by the attorney. (Cal.) *Fisher v. McInerney*, 68.

5. EXECUTION SALE to the Attorney of the Defendant is not Unlawful if made in good faith, with the consent of his client, and without any purpose of defrauding the latter's creditors. (Cal.) *Fisher v. McInerney*, 68.

6. EXECUTION SALE.—No Presumption Arises on the Purchase of Property under Execution by the Defendant's Attorney that the purchase was made for the benefit of the client or with his funds. (Cal.) *Fisher v. McInerney*, 68.

See Exemptions.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS and Administrators.—An Inventory is not Conclusive as to the ownership of the property, either as against third persons or the executor or administrator. (Wash.) *In re Belt's Estate*, 916.

2. EXECUTORS and Administrators—Inventory, What Need not Include.—An administrator need not include in his inventory property in his hands, which was held by the decedent as a trustee. (Wash.) *In re Belt's Estate*, 916.

3. AN ADMINISTRATOR of a Trustee is Entitled to the Possession of the Trust Funds, and may commence an action therefor in his individual or his representative capacity. (Wash.) *In re Belt's Estate*, 916.

4. EXECUTORS and Administrators — Estoppel to Claim that Property Recovered is Held in Trust.—An administrator who sues for and recovers property which his decedent held in trust is not estopped thereby, when called upon to include such property in his inventory, from showing the trust and that the estate had no beneficial interest in the property. (Wash.) *In re Belt's Estate*, 916.

5. ESTATES OF DECEDENTS.—Commissions of Administrator.—If one of several administrators performs no services, he is not entitled to any commission. (S. C.) *Ex parte Hilton*, 800.

6. LACHES — Pledgee, When not Guilty of.—A delay of two years in suing an administrator to recover the proceeds of pledged property received by him with notice of the pledge does not constitute such laches as precludes the maintenance of an action, when it appears that the pledgee gave the administrator prompt notice of his debt and of his claim to a lien as security, and made an effort to prove his debt as a claim against the estate of the decedent. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

7. PLEDGE — When not Waived.—An unsuccessful attempt to prove as an unsecured claim a secured claim against the estate of

a decedent does not, in the absence of any written waiver, extinguish the security, no one having been harmed by the attempt. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

8. STATUTE OF LIMITATIONS Against Administrators.—What is known as the short statute of limitations of Massachusetts, restricting the time in which creditors of a decedent must bring suit on claims against his estate, does not apply to a suit brought by a pledgee against an administrator to recover the proceeds of pledged property received by him. (Mass.) *Nashua Sav. Bank v. Abbott*, 430.

9. STATUTE OF LIMITATIONS Against the Claim of an Executor.—If an executor has a claim against the estate of a decedent, he has a right to retain it out of the assets, and the special statute barring claims unless presented within two years does not apply against such right of retaining. (Mass.) *Brown v. Greene*, 404.

10. ADMINISTRATOR'S SALES—Petition for by Authorized Person.—It is essential to the validity of a decree for the sale of land of a decedent to pay debts that the proceeding be instituted and maintained by the personal representative of the deceased. (Ala.) *Henley v. Johnston*, 48.

11. ADMINISTRATOR'S SALES.—A decree for the sale of decedent's land for the payment of debts is void, if the petitioner's appointment as administrator de bonis non is void. (Ala.) *Henley v. Johnston*, 48.

12. ADMINISTRATOR'S SALES—Insolvent Estate.—On a petition for the sale of lands of an insolvent estate to pay debts, the decree of insolvency makes a prima facie case of necessity for the sale, dispensing with the necessity of taking depositions as in chancery cases, and substituting such decree for proof of the existence of debts, and insufficiency of personal assets. (Ala.) *Henley v. Johnston*, 48.

13. ADMINISTRATOR'S SALES—Allegation of Ownership.—A petition for the sale of lands of a decedent to pay debts sufficiently shows his legal title or equitable right therein at the time of his death, when it alleges that he "died seised and possessed of certain interests and rights" in such land, not definitely known to the petitioner. (Ala.) *Henley v. Johnston*, 48.

14. ADMINISTRATOR'S SALES—Description of Land.—If neither the petition for the sale of lands of a decedent to pay debts nor the decree thereunder sufficiently describes the land to indicate with any degree of accuracy in what section, township, and range they are located, when such description is attempted, the decree and sale is defective and may be set aside. (Ala.) *Henley v. Johnston*, 48.

15. ADMINISTRATORS DE BONIS NON—Validity of Appointment.—Averments in a petition for letters of administration de bonis non, showing that the petitioner was the former administrator and had performed the duties of his office, that his final account was stated, audited, and approved on a certain date, that there were unadministered assets of the estate, unpaid debts, and that the estate was insolvent, are sufficient to give the court jurisdiction to appoint an administrator de bonis non without an averment that such former administrator had been finally discharged by order of court. (Ala.) *Henley v. Johnston*, 48.

16. JURISDICTION of Probate Courts—Presumption.—It must be presumed that there was a vacancy in the administration by resigna-

tion or removal of the former administrator, to sustain an order of the probate court granting letters of administration de bonis non. (Ala.) *Henley v. Johnston*, 48.

17. PROBATE COURT, Jurisdiction of, to Determine the Title to Property.—On an application to compel an administrator to inventory and have appraised certain property, the court of probate has jurisdiction to determine whether it belongs to the estate or the estate has any interest therein or reasonable claim thereto. Such determination is not binding on any person afterward claiming the property in another forum, but is only for the purpose of determining whether the administrator shall be forced to make an inventory thereof. (Wash.) *In re Belt's Estate*, 916.

See Animals; Courts.

EXEMPTIONS.

EXECUTION—Exemptions in Favor of Laborers.—A statute exempting "laborers' wages" does not apply to the wages of a locomotive engineer in charge of a passenger train. (La.) *State v. Land*, 392.

EXPERT EVIDENCE.

See Evidence, 5, 8.

EXTRADITION.

1. EXTRADITION Between the States of the Union is not governed by international law, but depends solely on the federal constitution, and the act of Congress made under it. No person can be extradited from one state to another unless the case falls within the constitutional provision. (N. Y.) *People v. Hyatt*, 706.

2. EXTRADITION.—To be a Fugitive from Justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. (N. Y.) *People v. Hyatt*, 706.

3. EXTRADITION.—The Fact that a Person not Actually Present in a state, at the time of the commission of the alleged crime, was subsequently present in the state for a single day, nearly a year before the institution of any prosecution against him, does not give the state a right to demand him from another, as a fugitive from justice. (N. Y.) *People v. Hyatt*, 706.

4. EXTRADITION.—The Warrant of the Governor in extradition proceedings is presumptive, but not conclusive, evidence that the person is a fugitive from justice. (N. Y.) *People v. Hyatt*, 706.

Extradition, constructive presence in the state where the crime was committed, 735.

evidence which must be exacted before the issuing of the governor's warrant, 731, 732.

habeas corpus, right to inquire upon respecting grounds upon which governor has issued his warrant, 728.

facts which must appear before the governor can issue his warrant, 728.

of a person who did not flee from the demanding state, 730.

presence of the accused in the state after the commission of the crime does not warrant his extradition when he was not present therein at such commission, 735.

Extradition, provisions of the constitution of the United States concerning are not self-executing, 727.

release on the ground that the person extradited was not in the state wherein the crime was committed, 730.

warrant of the governor for, when not conclusive of the right to hold persons under, 729.

See Habeas Corpus.

FELLOW-SERVANTS.

See Master and Servant.

FIRE.

See Bailments.

FIXTURES.

1. **FIGTURES Placed in a Building for the Purpose for Which It was Erected.**—The fact that a building is erected in accordance with plans approved by the intended lessees for the purpose of carrying on their business as bakers, and for that purpose is fitted up with ovens, does not establish that such ovens and the trade fixtures connected therewith and placed in the building by the tenants become a permanent part thereof, so as to lose their character as trade fixtures and render their removal at the expiration of the term unlawful. (Ill.) *Baker v. McClurg*, 261.

2. **FIXTURES—Removal of—When does not Injure Buildings so as to be Forfeited.**—That the removal of an oven will leave the original openings in two floors, as well as in the cement floor of the basement, and that such removal must be by taking down the ovens brick by brick, does not prove that the ovens, when affixed by the tenant, became a part of the realty, nor that their removal would necessarily injure the freehold. (Ill.) *Baker v. McClurg*, 261.

3. **FIXTURES—Removal of Which will Change Their Identity and Character.**—That the taking down of ovens brick by brick and removing the iron of the structure piece by piece would change the form of the original structures for the time being is clear, but this change in the identity and character of the fixtures is not sufficient to make their removal unlawful. (Ill.) *Baker v. McClurg*, 261.

4. **FIXTURES—Trade—Tests of Removability of.**—To determine the irremovable character of fixtures three tests are by the modern authorities applied, viz.: 1. Actual annexation to the realty or some appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is put; and 3. The intention of the parties making the annexation to make a permanent accession to the freehold. (Ill.) *Baker v. McClurg*, 261.

5. **FIXTURES—Forfeiture by Taking a New Lease.**—Where, at the expiration of a lease during which trade fixtures had been erected on the premises by the tenant, a new lease is taken by him containing no reservation of any right or claim to fixtures of the tenant still remaining on the premises, and no recognition of his right to remove them, they cannot be removed by him during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous. (Ill.) *Baker v. McClurg*, 261.

6. FIXTURES—Cancellation of Old Lease and Taking New Before the Expiration of the Term.—Where a member of a partnership which has leased premises desires to retire from the firm and to be released from the lease, and for that reason a new lease is given to the partner remaining in business for the balance of the original term, which lease is but a reiteration of the former lease, except that it contains a permission to the lessee to make an assignment, he does not forfeit his right to remove trade fixtures placed on the premises under the original lease. (Ill.) *Baker v. McClurg*, 261.

7. FIXTURES AND APPURTENANCES.—A hop-press erected with reference to use in a particular building, and constituting an article of merchandise bought and sold in the markets, though standing in the bailing-room, which is just high enough to receive it, an opening having been left for that purpose, which was floored over when it was placed in the building by a tenant, does not, as between a vendor and vendee, constitute either a fixture or an appurtenance so as to entitle the latter to damages on its removal by a tenant, such removal being accomplished by ripping up a floor and hitching a team to the press and hauling it away. (Wash.) *Sherrick v. Cotter*, 821.

8. FIXTURES.—Where the Superstructure of a Railroad is placed on the land of another, the railroad company cannot be said to have intended to attach the railway ties, and other appliances, to the freehold, so as to make them a part thereof. (Miss.) *Illinois Cent. R. R. Co. v. Hoskins*, 612.

FORCIBLE ENTRY AND DETAINER.

FORCIBLE ENTRY.—One who enters upon the possession of another against his will is guilty of a forcible entry, if the statute of the state defines a forcible entry to be one made by force, intimidation, fraud, or stealth. (Miss.) *Seals v. Williams*, 601.

FORECLOSURE.

See *Mortgages*.

FOREIGN STATUTES.

See *Evidence*, 2.

FORGERY.

See *Cancellation; Bills and Notes*.

Forged Instruments, jurisdiction of equity to cancel, 273-275.

FORMER JEOPARDY.

See *Criminal Law; Jeopardy*.

FRAUDULENT CONVEYANCES.

1. PREFERENCES—Right of a Creditor to Make.—Though the law looks with favor upon the equitable distribution of the assets of an insolvent among his creditors, it gives him the right to prefer one creditor to others. (Ill.) *Friedman v. Leshner*, 255.

2. CONVEYANCE, Voluntary—Effect of.—The title of a grantee in a voluntary conveyance is good against the grantor and the whole

world, subject to the equity of his creditors to have the property, if necessary, applied to the payment of their judgment against him. (S. C.) *Steinmeyer v. Steinmeyer*, 809.

3. THE ONLY CONSEQUENCE of a Voluntary Conveyance of Property by a Debtor is to render it invalid as to his existing creditors, but though, as between him and them, it may be regarded as still his, he retains in it, as against them, the same rights as if he had not attempted to convey it. (Miss.) *Dulion v. Harkness*, 563.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS.—An Agreement to Extend the Time to Redeem from a judicial sale of land, when acted upon by the parties, is not within the statute of frauds. (Ind.) *Turpie v. Lowe*, 310.

2. STATUTE OF FRAUDS.—Contracts Within the Statute are not void, but merely voidable. (Ind.) *Turpie v. Lowe*, 310.

FUGITIVES FROM JUSTICE.

See Extradition.

FUTURES.

See Constitutional Law, 8; Corporations, 7.

GARNISHMENT.

1. GARNISHMENT—Liability for Payment of Funds on Deposit. If a garnishee bank by answer admits the possession of money deposited by the defendant in the original suit which it pays out to the garnishing creditor before judgment against it in the garnishment proceedings, it is not thereby relieved of liability for such fund to the original defendant. (Ala.) *Bessemer Sav. Bank v. Anderson*, 38.

2. GARNISHMENT—Defenses.—To protect a garnishee as to a fund admitted to be in his hands, it must have been paid on a judgment in garnishment rendered against him, or as against the garnisher, the fund must have been paid over with his consent. (Ala.) *Bessemer Sav. Bank v. Anderson*, 38.

3. GARNISHMENT — Conflicting Claims.—If a garnishee bank admits, by answer, the possession of money deposited by the defendant in the original suit, and previously thereto it has notice that such money is claimed by a third person, it is the duty of such garnishee, in making answer, to make known that it has been notified of such claim, and if it fails in this, and pays the money after notice of such claim, it does so at its peril. (Ala.) *Bessemer Sav. Bank v. Anderson*, 38.

4. GARNISHMENT Cannot be Maintained Against a Partnership for a debt due by one of the partners. (Miss.) *Fewell v. American Surety Co.*, 625.

5. GARNISHMENT — What Subject to.—A Joint Debt—that is, indebtedness due to the defendant and another or others—may be garnished. This rule does not apply to debts due to a partnership of which the defendant was a member. (Miss.) *Fewell v. American Surety Co.*, 625.

6. **ON THE GARNISHMENT of a Joint Debt Due to the Defendant and Others**, the courts of Mississippi, under the code of that state, may take measures to ascertain and make certain the share which is due to him. (Miss.) *Fewell v. American Surety Co.*, 625.

GUARDIAN AND WARD.

GUARDIANSHIP.—There Cannot be Two Guardianships of the same person and property in this state at the same time. (Ind.) *Soules v. Robinson*, 301.

See Insane Persons.

GIFTS.

See Husband and Wife.

HABEAS CORPUS.

HABEAS CORPUS—Extradition.—The Action of a Governor in issuing a warrant of extradition may be reviewed on habeas corpus. (N. Y.) *People v. Hyatt*, 706.

HIGHWAYS.

HIGHWAYS.—A Traveler upon a Public Highway has a Right to Assume that it is safe for ordinary modes of travel. (Wash.) *Beall v. City of Seattle*, 892.

HOMESTEAD.

HOMESTEAD—Right to Claim After Decree Setting Aside Conveyance and Subjecting Property to Creditors' Claims.—A debtor after having a conveyance of his property set aside as fraudulent, may set up a claim to its exemption from sale by reason of his having made it a homestead since the entry of the decree. (Miss.) *Dulion v. Harkness*, 563.

See Public Lands.

HOMICIDE.

1. **MURDER Committed in the Chastisement of a Child.**—Though one stands in loco parentis toward a child who dies as the result of injuries inflicted on him through chastisement, the crime, if any, is not necessarily manslaughter, but the jury may return a verdict of murder if warranted by the evidence in drawing the inference that the purpose or intent was to take life. (S. C.) *State v. Shaw*, 817.

2. **HOMICIDE**—Evidence.—In a murder case, an inquiry as to whether the father of the deceased was sober on the occasion of a quarrel between him and the accused, some days before the killing, and whether, immediately thereafter a brother of the deceased came with a gun toward defendant's store, involves no part of the *res gestae*, and is therefore inadmissible. (Ala.) *Ferguson v. State*, 17.

3. **MURDER OF AN ADULTERER.**—The Law Deems the Husband's Passions excited by surprising his wife in the act of adultery so far uncontrollable that if he kill her paramour on the impulse of the moment, and no actual malice is disclosed, none should be imputed, and while the husband is not justifiable, he is not a murderer. (Conn.) *State v. Yanz*, 205.

4. MURDER — Killing of One Erroneously Believed to be an Adulterer.—If a husband surprises his wife and a man in such position and circumstances as to create in the husband's mind a reasonable belief that they are committing an act of adultery, the killing by him of such man is not made less justifiable by proof that no adultery was committed. (Conn.) *State v. Yanz*, 205.

Homicide, adultery, belief of husband that act of is committed, whether reduces offense of killing, 217.

adultery, killing by husband because of, where he does not discover parties in the act, but waits for time for passion to cool, 217.

adultery, killing by husband of wife or paramour, when constitutes murder, 216, 217.

adultery, killing by husband, surprising wife and another apparently, but not actually, in act of, 215.

adultery, killing by husband surprising wife and another in act of, 214.

adultery, statutes respecting killing by husband who detects his wife in the act of, 216.

adultery, evidence admissible on the trial of a husband for killing adulteress or her paramour, 219.

adultery, killing of by husband, when amounts to manslaughter and when to murder, 218.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—Provision for Wife.—A note in favor of a married woman, secured by deed of trust, without expressly reserving an interest in her husband, is presumed to be a provision for her, and he is not deemed to have a resulting trust therein, simply because he furnished the money for which the note was given in payment. (Mo.) *Case v. Epschied*, 633.

2. HUSBAND AND WIFE—Gift—Resulting Trust.—If money is deposited in bank by a husband in the name of his wife, and land is thereafter purchased therewith and conveyance made to her, it becomes her separate property, with no resulting trust in his favor. (N. C.) *Flanner v. Butler*, 773.

3. HUSBAND AND WIFE—Conveyance for the Purpose of Depriving Her of Her Share in His Estate.—A conveyance of real property by a husband, reserving a life estate to the grantor, given in consideration of care bestowed and to be bestowed on him as long as he lives, but made chiefly for the purpose of depriving her of her statutory share of his estate, is valid and enforceable against her after his death, and will not be set aside in equity. (Mass.) *Leonard v. Leonard*, 426.

4. HUSBAND AND WIFE — Gift Which Cannot be Enforced Against Her.—The taking of money out of a bank by a husband and depositing it in the name of a third person in the life time of the former, who lived for several years and drew no part of the money, may properly be regarded as illusory, where the object of the husband was to deprive his wife of her statutory rights in his estate. (Mass.) *Leonard v. Leonard*, 426.

5. CONFLICT OF LAWS — Liability of Married Woman.—If a married woman gives a promissory note in the state of her residence, which is there valid and enforceable against her, it may be enforced in the courts of another state, though if executed there it would not have been valid. (La.) *Baer Brothers v. Terry*, 394.

6. **CONTRACTS with Married Women—Rescission.**—A person contracting with a married woman is not entitled to relief from his contract, on the ground of want of mutuality, if it appears certain that under the facts he will not be exposed to loss or injustice by its enforcement, and it is impossible to place the parties in substantially the same condition that they were before the contract was made. (Ky.) *Holmes v. Holmes*, 342.

7. **A HUSBAND is Answerable for an Assault Committed by His Wife**, though he was not present, and her act was without his knowledge or consent. The common-law rule making a husband liable for the torts of his wife has not been changed by the statutory law of California. (Cal.) *Henley v. Wilson*, 160.

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INFANTS.

1. **INFANT'S RIGHT to Disaffirm a Conveyance—Within What Time may be Exercised.**—An infant who makes a conveyance has until such time as will complete the bar of the statute of limitations, after the removal of his disability, to disaffirm his deed, and his silent acquiescence will not be regarded as a confirmation of the sale, unless prolonged for the period required to make the statute of limitations a bar, or under circumstances requiring him to decide and act as to confirmation or disaffirmance. (Miss.) *Shipp v. McKee*, 616.

2. **AN INFANT REMAINDERMAN Conveying His Interest in Real Property is not Required to Disaffirm** his conveyance during the continuance of the life estate, though in the meantime he has become an adult, but may disaffirm, after the expiration of such estate, at any time before the right to maintain an action to recover the property has been barred by the statute of limitations. (Miss.) *Shipp v. McKee*, 616.

3. **INFANTS.—The Right to Disaffirmance of a Conveyance Made by One When an Infant is not Lost by Mere Inertness or Silence** continuing for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an

intention to consent to the conveyance. (Miss.) *Shipp v. McKee*, 616.

4. INFANTS—Statute of Limitations Against is not Brought into Action by the Neglect of Their Guardian.—The fact that the life tenant became the guardian of minor reversioners could not put the statute of limitations into operation, so as to affect their right of action for waste. It is only when the legal title to property is in a guardian that the statute of limitations begins to run. (Miss.) *Learned v. Ogden*, 621.

See Parent and Child.

INJUNCTIONS.

1. INJUNCTION is Proper Remedy to prevent the breach of a contract between merchants to close their places of business at a certain hour each day for a limited period of time. (Ky.) *Stovall v. McCutchen*, 373.

2. INJUNCTION is a Proper Remedy to prevent a multiplicity of actions, or to prevent a repeated and recurring cause of action. (Ky.) *Stovall v. McCutchen*, 373.

3. INJUNCTIONS—Attorneys' Fees as Damages.—Attorneys' fees incurred in obtaining the dissolution of an injunction may be recovered as damages in an action on the injunction bond, and the measure of such fees recoverable is the fair and reasonable value of the services rendered. (Ala.) *Jesse French Piano etc. Co. etc. Co. v. Porter*, 31.

4. INJUNCTIONS—Dissolution—Attorneys' Fees on Appeal as Damages.—If a temporary injunction is dissolved, and an appeal taken, attorneys' fees incurred in successfully resisting the effort to have the decree of dissolution set aside are recoverable as damages in an action on the injunction bond. (Ala.) *Jesse French Piano Co. v. Porter*, 31.

5. INJUNCTIONS—Dissolution—Damages—Accrual of Right of Action.—An action for damages may be maintained upon an injunction bond immediately upon the rendition of an interlocutory decree dissolving the preliminary injunction, without waiting for a final hearing of the cause in which the writ issued. (Ala.) *Jesse French Piano etc. Co. v. Porter*, 31.

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ILLEGITIMATES.

See Bastards.

INSANE PERSONS.

1. LUNACY INQUISITION—Presence of Subject of Inquiry.—Though the record of a cause, in which a person is adjudged insane, and a guardian appointed, is silent as to his appearance or presence in court, or as to notice given him, it will be presumed, as against collateral attack, that the court acquired jurisdiction. (Ind.) *Soules v. Robinson*, 301.

2. LUNACY INQUISITION.—A Judgment Pronouncing a person insane, and under guardianship, if not void, fixes the status of such person, while it stands unrevoked, and a judgment of another court

in a different county as to such person's sanity is void. (Ind.) *Soules v. Robinson*, 301.

3. **THE DEED of an Insane Person** not under guardianship is merely voidable, and vests title until disaffirmed by the grantor on becoming sane or by his heirs. (Ind.) *Downham v. Holloway*, 330.

4. **DEED OF INSANE PERSON.**—The Statute of Limitations does not run from the date of the execution of a deed by an insane person so as to bar an action, on her death, by her heirs against the grantor for partition and to quiet title. (Ind.) *Downham v. Holloway*, 330.

5. **AN INSANE GRANTOR** Cannot Affirm or Disaffirm his deed so long as he remains of unsound mind. (Ind.) *Downham v. Holloway*, 330.

INSTRUCTIONS.

See Trial.

INSURANCE.

1. **INSURANCE—Construction of Policy.**—A Clause Relating to a Change in the Condition of the Title of the property insured relates to a change taking place after the issuing of the policy. (S. C.) *Steinmeyer v. Steinmeyer*, 809.

2. **INSURANCE if Grantee Holding a Voluntary Conveyance.**—The condition in a policy of insurance, that if the insured has not the conditional and sole ownership it shall be void, is not broken by the fact that he holds under a voluntary conveyance from his grantor which the latter's creditors have been adjudged to have the right to avoid to the extent of selling the property so far as may be necessary to discharge their obligations. (S. C.) *Steinmeyer v. Steinmeyer*, 809.

3. **INSURANCE, Proceeds of—Creditors, when not Entitled to.**—If the grantee of property under a voluntary conveyance procures insurance thereon, the creditors of the grantor, though adjudged entitled to sell it for the satisfaction of their judgments, are not, on its destruction by fire, entitled to the proceeds of the insurance so effected. Such proceeds must be deemed the property of the person insured. (S. C.) *Steinmeyer v. Steinmeyer*, 809.

4. **INSURANCE.**—Parol Contract to Renew a policy of insurance made before the expiration of the old policy is valid, though nothing is said or done about the premium, if the parties have dealt together for years and know the rate of premium and the insurance agent has habitually given credit for the premium and has collected it on demand. (Ky.) *Baldwin v. Phoenix Ins. Co.*, 362.

5. **CONFLICT OF LAWS.**—Whether an assignment of policies of life insurance from a husband to his wife passes the whole interest in it depends on the law of the state of their domicile, and if this is Massachusetts, the effect is the same as if the assignment were made to her by a third person, to whom the husband had previously assigned the policy. (Conn.) *Colburn's Appeal*, 231.

6. **LIFE INSURANCE—Assignment of Policy.**—The Acceptance of an assignment of a policy of life insurance is sufficiently implied from the failure of the assignee to dissent. (Conn.) *Colburn's Appeal*, 231.

7. **LIFE INSURANCE—Assignment of Policy—Presumption of Consideration.**—Where an assignment of a policy of life insurance

purports to be for a valuable consideration, it will be presumed that a sufficient consideration existed. (Conn.) Colburn's Appeal, 231.

8. **INSURANCE, LIFE.**—An assignment of a policy of life insurance need not be in writing, nor need the policy be delivered. (Conn.) Colburn's Appeal, 231.

9. **BENEFICIAL ASSOCIATIONS.**—The interest of the beneficiary of a certificate in a fraternal beneficial association is not a vested interest. (Ill.) Middeke v. Balder, 284.

10. **BENEFICIAL ASSOCIATIONS**—Effect of a Member and the Beneficiary Dying in a Common Disaster, or at the Same Time.—If a certificate of a beneficial association provides that the amount designated therein shall be paid to the beneficiary in the event of her dying before the member, otherwise to his heirs, and the member and the beneficiary perish in a common disaster, the effect is the same as if there was proof that she died first, and the heirs at law of the member are entitled to recover the amount provided to be paid by the certificate. (Ill.) Middeke v. Balder, 284.

11. **LIFE INSURANCE**—Self-destruction.—It is an implied condition of a policy of life insurance that the insured will not purposely, when in sound mind take his own life. (N. Y.) Weber v. Supreme Tent etc., 753.

12. **BENEFIT SOCIETY**—Retrospective By-law—Suicide.—If a benefit society has insured a member against unintentional self-destruction after one year, it cannot, by a subsequent amendment of its by-laws, provide that self-destruction, while insane, within five years from the date of the policy shall render the policy void. (N. Y.) Weber v. Supreme Tent, etc., 753.

13. **INSURANCE**—Interest of Beneficiary.—There is no difference between an accident and an ordinary life insurance policy, as to the interest which the beneficiary takes therein. (Mo.) United States Casualty Co. v. Kacer, 641.

14. **INSURANCE** — Interest of Beneficiary — Distribution.—The statute of descents and distributions has no application to a policy of life insurance as affecting the interest of the beneficiary therein, in case of dispute as to the survivorship of the insured, and the beneficiary named in the policy. (Mo.) United States Casualty Co. v. Kacer, 641.

15. **INSURANCE**—Interest of Beneficiary—Change of.—The beneficiary in a policy of life insurance has ab initio a vested interest in the policy and in the money which is to become due under it, which neither the assured nor the company can impair or take away by any act or deed, without his consent. (Mo.) United States Casualty Co. v. Kacer, 641.

16. **INSURANCE**—Interest of Beneficiary—Survivorship.—If a life insurance policy names a certain person as beneficiary, if he survives the insured, otherwise the fund to go to the latter's legal representatives, the named beneficiary takes a vested interest in the policy and fund, subject only to be divested by his death prior to that of the assured. The latter's representatives take only a contingent interest, to take effect in case of the death of the named beneficiary, before the death of the assured. In case of dispute as to whether the assured or the named beneficiary died first, the burden of proof is on the legal representatives of the assured to show that he survived such beneficiary, and, failing in this, the fund must be paid to such beneficiaries' legal representatives. (Mo.) United States Casualty Co. v. Kacer, 641.

17. INSURANCE—When not Impressed with a Trust.—An insurance indemnifying one for his liability to persons who might be injured through his negligence is not, on the occurrence of such an injury, impressed with a trust in favor of the person injured. The insurer is therefore at liberty to settle with and pay to the insured such sum as they may in good faith agree upon, and such payment being made, the person injured has no recourse against the insurer. (Mass.) *Bain v. Atkins*, 411.

18. EVIDENCE IMMATERIAL—Reversal for Admission of.—In an action to recover for personal injuries claimed to be due to the negligence of the defendant, it is error, entitling him to reversal, to admit, against his objection, testimony showing that in case of a recovery, he is indemnified from loss by a policy in a casualty insurance company. (Miss.) *Herrin, Lambert & Co. v. Daly*, 605.

19. INSURANCE—Indemnity—Bankruptcy.—If a policy of insurance against loss sustained by an employer through accident to his employee provides that "no action shall lie against the insurance company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue," the insurance company is liable only for the amount paid by the employer on such judgment, and if his property is transferred to a trustee in bankruptcy, the insurer's liability is determined by ascertaining what percentage the assets of the bankrupt, outside of the policy, will pay on the debts proved against his estate, outside of the judgment, and the insurer's liability is the same percentage of such judgment. (N. J. Eq.) *Travelers' Ins. Co. v. Moses*, 663.

INSURANCE COMMISSIONER.

See *Mandamus*.

INTEREST.

INTEREST from the Commencement of an Action to the Recovery of Judgment Cannot be Allowed in an action to recover moneys paid to purchase stocks on a margin. (Cal.) *Parker v. Otis*, 56.

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JOINT TORT-FEASORS.

See Torts.

JUDGES.

1. **JUDGE—Waiver of Disqualification of.**—An objection to a judge on the ground that he is related to one of the parties may be waived, and is waived if known to a litigant and not made by him until after the cause has been heard and judgment orally pronounced. (S. C.) *Ex parte Hilton*, 800.

2. **PRACTICE.**—The Objection that the Judge Pro Tempore who tried the case was not sworn cannot be urged on appeal when not seasonably raised in the trial court. (Wash.) *First Nat. Bank etc. v. Parker*, 828.

JUDGMENTS.

1. **JUDGMENT in Another State—Right to Impeach Consideration of.**—A contract deemed by our civil and criminal laws immoral, and which the courts of this state are prohibited from enforcing, is not sanctified and purged of its illegality by a judgment rendered thereon in another state against a citizen of this state sued and served with process on being found temporarily in the jurisdiction of the court, so that in a suit here on such judgment the illegal character of the cause cannot be inquired into. (Miss.) *Lum v. Fauntleroy*, 620.

2. **A JUDGMENT of a Circuit Court of the United States for California** stands in respect to its proof and also to its essential nature, on the same footing as if it had been rendered by another court in this state. (Conn.) *Barber v. International Co.*, 246.

3. **JURISDICTION—Recitals in Judgment Record.**—The doctrine of the absolute verity of the judgment record cannot apply when the want of jurisdiction of the court is the very question in issue, and this is true, although the plaintiff, in his petition, couples a count to have the judgment annulled with another count in ejectment praying for the possession of the land sold under the void judgment. (Mo.) *Mullins v. Reiger*, 651.

4. **JUDGMENTS—Jurisdiction—Recitals in Record.**—An erroneous adjudication of a fact by a court of general jurisdiction is conclusively true, but a false recital in the judgment of a jurisdictional fact is not conclusive, and may be contradicted. (Mo.) *Mullins v. Reiger*, 651.

5. **JUDGMENTS—Presumption—Impeachment of Jurisdiction.**—The general presumption in favor of the judgment of a court of general

jurisdiction does not avail as an absolute conclusion against a party offering, in an independent proceeding, to show facts and circumstances, which go to the impeachment of the court's assumed and presumed jurisdiction in the particular case assailed, either by the court roll itself, or by facts aliunde the roll. (Mo.) *Mullins v. Rieger*, 651.

6. **JUDGMENT—Merger of in Judgment.**—If a judgment creditor brings an action on his judgment constituting a lien on the debtor's homestead, and obtains a new judgment, the first judgment is not merged in the second so as to destroy the priority of the first. (N. C.) *Springs v. Pharr*, 775.

7. **JUDGMENT FOR MONEY—What is not.**—An order of court, in a cause in which a receiver has been appointed reciting due prosecution of his claim and its nature and amount, and that such amount less certain offsets is a valid claim against the defendant, is not a judgment for money and does not merge or change the character of the claim to be allowed. (Conn.) *Barber v. International Co.*, 246.

8. **A JUDGMENT is not Presumed** to have been paid until after twenty years. (Conn.) *Barber v. International Co.*, 246.

9. **THE STATUTE of Limitations of Connecticut does not Run Against a Judgment** of a court of that state or of the United States. (Conn.) *Barber v. International Co.*, 246.

10. **RES JUDICATA—Judgment, When not Final so as to Support Plea of.**—A judgment of the appellate court reversing a cause and remanding it without directions is not final so as to support the plea of *res judicata*. (Ill.) *Friedman v. Leshner*, 255.

11. **RES JUDICATA.**—A judgment in favor of a wife in an action against her for the purchase price of mules purchased by her for the benefit of her separate estate situate in Louisiana, does not bar a recovery against her in a subsequent action upon a promissory note executed by her in another state, of which she was then a resident, in consideration of the sale to her of the same mules, and which note was valid and enforceable against her where executed. (La.) *Baer Bros. v. Terry*, 394.

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JUDICIAL SALES.

1. **JUDICIAL SALE, Redemption From—Limitations.**—A proceeding in equity to redeem lands held by the defendant under a sheriff's deed, absolute on its face, but alleged to be a mortgage, is governed by the limitation of fifteen years. (Ind.) *Turpie v. Lowe*, 310.

2. **JUDICIAL SALE—Extension of Time for Redemption.**—The statutory time within which lands sold on execution may be re-

deemed may be extended by contract without otherwise affecting the rights of the holder of the certificate of purchase. (Ind.) *Turpie v. Lowe*, 310.

3. **JUDICIAL SALE—Effect of Extending Time of Redemption.**—The mere extension by agreement of the time in which to redeem from a judicial sale does not convert the claim of the purchaser into a security which must be enforced by a new action, but his relation to the property remains that of a successful bidder at the sale. (Ind.) *Turpie v. Lowe*, 310.

4. **JUDICIAL SALE.—If the Period of Redemption** from a judicial sale is created or extended by contract, the redemptioner must exercise his right within that time, or within a reasonable time if the time is not fixed and certain. (Ind.) *Turpie v. Lowe*, 310.

5. **JUDICIAL SALES—Unreleased Mortgage.**—Although a mortgage has not been released of record at the time of a judicial sale of the land, this is no valid objection to the title, if such mortgage has been in fact paid and is not a subsisting lien upon the property. (Ky.) *Napper v. Mutual Life Ins. Co.*, 340.

6. **JUDICIAL SALES—Resale—Liability for Deficit.**—If a purchaser at judicial sale refuses to execute a bond for the purchase price, the property may be resold and judgment rendered against him for the difference between his bid and the diminished amount of the price obtained on the resale. (Ky.) *Napper v. Mutual Life Ins. Co.*, 340.

See Executors and Administrators.

JURISDICTION.

See Appearance; Judgments; States.

JURY.

JURY TRIAL.—When a Juror Becomes so Ill During the Trial of a Civil Case that he is unable to attend, the court may cause additional jurors to be summoned, and require one of them to be selected to take the place of the juror disabled, and then order the trial to proceed de novo. (La.) *Lindsey v. Tioga Lumber Co.*, 384.

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LICENSE.

1. **LICENSE to Enter Upon Lands of Another—What is not.**—The mere toleration of trespassers does not alone constitute a license, and certainly not an invitation. (Mich.) *Ryan v. Towar*, 481.

2. **CHILDREN—License to.**—As to the question of license or invitation, there is no difference between children and adults, and the failure to prevent their trespassing upon premises does not constitute a license or invitation for them to continue so doing. (Mich.) *Ryan v. Towar*, 481.

LIMITATION OF ACTIONS.

1. **STATUTE OF LIMITATIONS Against One of the Several Plaintiffs.**—Where the action is joint, there can be no recovery of any part of a cause of action which is barred by the statute of limitations against any of the plaintiffs. (Miss.) *Learned v. Ogden*, 621.

2. **THE STATUTE OF LIMITATIONS Against a Person Under Disability** begins to run the moment he is disseised, but he is allowed all the time specified in the statute for commencing his action after the disability is removed. (Conn.) *Carney v. Hennessey*, 199.

3. **STATUTE OF LIMITATIONS.—An Action to Recover Moneys Paid for the Purchase Price of Stocks on a Margin** is not for a penalty or forfeiture; but an action for moneys had and received, and subject to the provisions of the statute of limitations governing those actions, and not to those applying to actions upon a statute for the recovery of money or forfeiture, though the right of recovery is conferred only by the provision of the state constitution. (Cal.) *Parker v. Otis*, 56.

4. **LIMITATIONS—Acknowledgment or New Promise.**—A letter from the indorser of a note to the holder, stating his inability to pay it, but expressing a readiness to buy it if the holder will name some small sum, does not remove the bar of the statute of limitations. (N. Y.) *Connecticut Trust etc. Co. v. Wead*, 756.

5. **LIMITATIONS—Nonresidents.—Casual Temporary Visits of a nonresident to this state** do not break the continuity of his absence so as to entitle him to the benefit of the statute of limitations. (N. Y.) *Connecticut Trust etc. Co. v. Wead*, 756.

6. **LIMITATIONS—Absence and Nonresidence.**—There is a marked difference between the status of an absent resident and that of a nonresident, and the ability of a creditor to pursue them. (N. Y.) *Connecticut Trust etc. Co. v. Wead*, 756.

7. **PLEADING.—The Defense of the Statute of Limitations Cannot be Presented by a Demurrer** suggesting that the complaint does not state facts sufficient to constitute a cause of action. (Wash.) *Joergenson v. Joergenson*, 888.

See *Adverse Possession*; *Executors and Administrators*, 8, 9; *Judgments*; *Judicial Sales*, 1; *Infants*, 4; *Insane Persons*, 4; *Mortgages*, 3.

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See *Actions*.

MANDAMUS.

MANDAMUS Will not Issue Against the Insurance Commissioner to Compel Him to Change His Valuation of outstanding policies issued by the petitioner, on the ground that he has made a mistake of law or of fact, where it is not contended that he has acted in bad faith or willfully disobeyed the law. (Mass.) Providence etc. Assur. Soc. v. Cutting, 415.

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MASTER AND SERVANT.

1. **MASTER AND SERVANT**—Safe Tools and Place to Work.—By the common law an employer is required to exercise that degree of care in providing his employé a safe working place and tools and appliances which a reasonably prudent man would exercise under like circumstances. (Ind.) Davis Coal Co. v. Polland, 319.

2. **MASTER AND SERVANT**.—An Employe Assumes the Risks, as a matter of contract, that are known to him, or might have become known, by the exercise of ordinary care, of which he has made no complaint. (Ind.) Davis Coal Co. v. Polland, 319.

3. **MASTER'S STATUTORY DUTY**.—It is the Duty of an Employer to use the very means prescribed by statute for the safety of employes; he is not at liberty to adopt others, though in his opinion more efficacious. (Ind.) Davis Coal Co. v. Polland, 319.

4. **MASTER AND SERVANT**.—The Fact that a Statute, which requires mine owners to provide for the safety of their employes, makes a failure to comply therewith a misdemeanor does not affect an employé's right to recover damages for personal injuries. (Ind.) Davis Coal Co. v. Polland, 319.

5. **MASTER AND SERVANT**.—The Risks that Arise from an employer's disregard of specific statutory requirements for the safety of employes cannot be put upon an employé. (Ind.) Davis Coal Co. v. Polland, 319.

6. **MASTER AND SERVANT**—Contributory Negligence.—Assumption of Risk is a matter of contract; contributory negligence is a question of conduct. (Ind.) Davis Coal Co. v. Polland, 319.

7. **MASTER AND SERVANT—Contributory Negligence.**—If a coal miner tests the roof and finds the slate apparently secure, and no discoverable injury is immediately threatening, he is not compelled to give up his work on pain of being held negligent when the slate is unpropped. (Ind.) *Davis Coal Co. v. Polland*, 319.

8. **TEMPORARY VICE-PRINCIPAL—Who is.**—If, in the prosecution of work, it is necessary to pass signals to the workmen, on the correct transmission of which their safety may depend, and the foreman selects one of their number to pass such signals, which he incorrectly does, he is performing a duty imposed on the principal, and must be regarded not as a fellow-servant of a workman injured by his negligence, but as a vice-principal for whose negligence the employer is answerable to the workman injured. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

9. **MASTER AND SERVANT—Performance by Servant of Duties of Principal.**—A fellow-servant, in performing the duties of the master, by his direction, becomes the agent of the master in the performance of those particular duties, and, for the time being, ceases to be in the common employment. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

10. **MASTER—Liability of One Servant for the Negligence of Another.**—A master is liable to one servant for injuries caused by another if they result from the omission of some duty of the master which he has confided to the inferior employé and the duty of the master is personal and cannot be delegated. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

11. **MASTER AND SERVANT—Dual Relations of Servants to One Another.**—Parties working together as fellow-servants may be fellow-servants as to some part of the employment and principal or master with regard to some other part. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

12. **MASTER AND SERVANT.**—If the Negligence of a Fellow-servant is Combined with that of the Master, and this combined negligence causes injury to another servant, the master is liable. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

13. **MASTER AND SERVANT—Care to be Exercised in Furnishing Appliances and Servants.**—It is the duty of the master to furnish reasonably suitable and sufficient machinery, appliances, and servants, and this duty is discharged when he exercises ordinary and reasonable care in so doing. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

14. **FELLOW-SERVANTS.**—The Common-law Rule that a master is not liable to his servant for an injury sustained through the negligence of a fellow-servant is presumed to prevail in a sister state. (Ind.) *Baltimore etc. Ry. Co. v. Reed*, 293.

15. **FELLOW-SERVANTS.**—A Statute Creating a Liability against a master for injuries to his servant through the negligence of a fellow-servant has no extraterritorial effect to give a right of action for an injury received in a sister state. (Ind.) *Baltimore etc. Ry. Co. v. Reed*, 293.

16. **A MASTER is not Liable to His Servant for injuries caused solely by the negligent act of a competent fellow-servant.** (Conn.) *Kelly v. New Haven Steamboat Co.*, 220.

17. **MASTER AND SERVANT—Injury to One Servant from the Neglect of Another.**—A master is not liable to one servant for an

injury due to the negligence of another, unless the duty violated by the offending fellow-servant was one resting upon the master. If the duty rests upon the master, he, as a general rule, is liable to the injured servant for the negligence of the offending servant; otherwise he is not. (Conn.) *Kelly v. New Haven Steamboat Co.*, 220.

18. MASTER AND SERVANT—Appliances, Negligence in the Use of.—Where a master has furnished suitable appliances for his servants to work with, he is not answerable to one of them who is injured by the failure to use such appliances, such failure being due solely to the negligence of a fellow-servant. (Conn.) *Kelly v. New Haven Steamboat Co.*, 220.

19. MASTER AND SERVANT—Minor Employee Injured Through Failure to Instruct.—A minor employé, who is set to work where the work of his coemployés made it necessary for his protection that he should have been informed that an error on their part would carry with it danger to him, and have been told of this possible danger and the means of guarding against it, and if, by reason of not being so told, he is injured, his employer is liable. (La.) *Lindsey v. Tioga etc. Co.*, 384.

20. MASTER AND SERVANT—Failure of Fellow-Servant to Instruct Inexperienced Employee.—A master cannot escape liability for an injury suffered by a minor, inexperienced employé, from the failure to warn him of the dangers of his employment, and to instruct him how to avoid them, on the ground that such failure was due to the fault or neglect of a fellow-servant. (La.) *Lindsey v. Tioga etc. Co.*, 384.

21. MASTER AND SERVANT—Punitive Damages.—In an action by the parents of a minor, whose injuries and death were due to his inexperience in the employment to which he was put, and the failure to warn him of the attendant danger, the jury, in estimating the damages, should not act arbitrarily, nor award vindictive or punitive damages. In this case a verdict of five thousand dollars was reduced by the appellate court to two thousand five hundred dollars. (La.) *Lindsey v. Tioga etc. Co.*, 384.

22. CONFLICT OF LAW.—If an Injury to a Servant is not actionable in the state where committed, no cause of action can be carried to and asserted in another state. (Ind.) *Baltimore etc. Ry. Co. v. Reed*, 293.

See Constitutional Law; Street Railways.

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MILLERS.

See Bailments.

MINE OWNERS.

See Constitutional Law, 6.

MINORS.

See Infants.

MORTGAGES.

1. MORTGAGE, When Cannot be Foreclosed for Nonpayment of Interest.—A mortgage taken to secure a promissory note payable

three years after date, with interest as therein stated, payable monthly, cannot be foreclosed until the principal is due, if the condition of the note is that the mortgagor shall on or before maturity pay the note with the interest that may be due thereon. (Wash.) *Bank v. Doherty*, 903.

2. MORTGAGE—Foreclosure for Interest, When Right of is not Given by Statute.—A statute providing that whenever the complaint is filed to foreclose a mortgage upon which there should be due any interest or installment of principal, or there are installments not due, the defendant may pay into court the principal and interest due with costs, and proceedings shall then be stayed, does not authorize the foreclosure of a mortgage before the principal becomes due, where such foreclosure is not authorized by the terms of the mortgage itself. (Wash.) *Bank v. Doherty*, 903.

3. MORTGAGES—Option to Foreclose—Statute of Limitations.—A provision in a mortgage that upon default in the payment of interest, the right to foreclose shall immediately accrue, is for the benefit of the mortgagee and cannot be taken advantage of by the mortgagor. Hence, the statute of limitations does not run in favor of the latter from such default where the mortgagee does not elect to avail himself of it. (Wash.) *First Nat. Bank etc. v. Parker*, 828.

4. MORTGAGE—Stipulation for Attorneys' Fee, When Does not Affect the Time for Foreclosure.—A stipulation in a mortgage that if the mortgagor fails to pay the note with interest, or any part thereof, a suit shall be commenced and attorneys' fees shall be allowed, does not entitle the mortgagee to commence suit to foreclose for the non-payment of interest, the principal not being due. This stipulation is not intended to affect the other provisions of the mortgage, but merely to provide for the attorneys' fee when the right to foreclose accrues and is exercised. (Wash.) *Bank v. Doherty*, 903.

5. MORTGAGES.—A Mortgagee Cannot Purchase at His Own Foreclosure Sale Under a Power, either directly or indirectly, unless the mortgage confers such power or the mortgagor consents to such purchase. It is not necessary for a mortgagor, when seeking to avoid the sale to show either fraud or unfairness therein. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

6. MORTGAGE—Purchase by the Mortgagee in the Name of Another.—If, at a sale by a mortgagee under a power in the mortgage, the property is bid in by a third person acting for him, to whom the purchaser afterward conveys, nothing being paid on the bid except the credit of its amount after deducting the expense of the sale on the indebtedness secured by the mortgage, the effect is the same as if the mortgagee had purchased directly or in his own name. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

7. MORTGAGE—Time for Filing Bill to Redeem from Sale Under.—Unless some statute of limitations provides otherwise, there is no hard-and-fast rule which can be laid down as to what is the time within which a mortgagor, or one claiming under him, must file a bill to avoid the sale and to redeem. Each case must be determined on its particular facts. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

8. LACHES in Filing a Bill to Redeem.—Where There is a Statute Fixing the Time within which a bill to redeem may be filed, no delay in filing it where the mortgagee has himself purchased under a power in the mortgage can bar or estop the mortgagor, if the suit

is brought within the time designated by the statute. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

9. **MORTGAGE—Bill to Redeem Brought in Favor of a Grantee of the Mortgagor.**—If the mortgaged premises are sold under a power in the mortgage, the mortgagee becoming the purchaser, one who subsequently receives a quitclaim deed from the mortgagor may maintain a bill to redeem. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

10. **EQUITY—Assignment of Right to File a Bill in.**—A quitclaim deed by a mortgagor after a voidable sale has been made to the mortgagee under a power is not an assignment of a bare right to file a bill in equity for fraud committed on the grantor, which is against public policy. It transfers all the right and estate which the mortgagor had, including the right to file the bill to redeem. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

11. **MORTGAGEE—Bill to Redeem Where There is an Innocent Purchaser.**—If a sale is made under a power in a mortgage to a third person acting for the mortgagee, and the property is subsequently sold by such mortgagee to innocent purchasers, who pay part of the purchase price, the mortgagor or his successor in interest is in equity entitled to a decree that the mortgagee pay over the money so received, and that such purchasers make their further payments to the complainants. (Miss.) *Houston v. National Mut. etc. Assn.*, 565.

See **Judicial Sales; Setoff and Counterclaim.**

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MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—Vote of Two-thirds of the Members of a Common Council—What does not Amount to.—If a statute provides that if a municipal ordinance has been vetoed by the mayor, it may be reconsidered, but the vote of two-thirds of the members elected to the common council shall be necessary to pass it, the fact that there are vacancies in office due to death or resignation does not diminish the number of votes necessary to pass the ordinance over the veto. (Mich.) Pollasky v. Schmid, 560.

2. MUNICIPAL ORDINANCES—Early Closing.—A city ordinance requiring stores to be closed after a certain hour in the early evening is invalid, as an unauthorized interference with the free use and enjoyment of property. (N. C.) State v. Ray, 795.

3. PUBLIC NUISANCE.—The Erection of a Building across a street constitutes a public nuisance, and an individual cannot recover damages from the author, unless he sustains some particular or peculiar injury differing in kind and not common to that sustained by the public. (Ind.) O'Brien v. Central Iron etc. Co., 305.

4. PUBLIC STREETS.—An Abutting Owner, in addition to his right with the public to the use of the street from end to end for passage, has an individual property right in that part of the street necessary to free and convenient egress and ingress to his property, which cannot be interfered with without the wrongdoer being answerable. (Ind.) O'Brien v. Central Iron etc. Co., 305.

5. PUBLIC NUISANCE.—An Individual may Maintain an Action against one who constructs a building across the street some two hundred feet from the plaintiff's residence, and between it and the business part of the city. (Ind.) *O'Brien v. Central Iron etc. Co.*, 305.

6. MUNICIPALITY—Contract with Exempting Itself from Liability, Where There is No Other Remedy for the Other Contracting Party.—If a municipal corporation in contracting for the construction of sidewalks provides that payment therefor shall be made only out of special taxes, and that the contractor takes all risks of the invalidity of such taxes and of the proceedings therein, and agrees to make no claim against the municipality in any event, he cannot maintain an action against it on the ground that the ordinance and proceedings for the levying of such taxes were irregular and void, and that the municipality had power to provide for payment out of its general revenues. (Ill.) *Village of Park Ridge v. Robinson*, 276.

7. MUNICIPALITY—Power of to Limit Its Liability under Contract.—A municipal corporation contracting for the building of sidewalks has an implied power to limit its liability, by providing that the contractor shall resort to a special tax or fund only, and that he takes the risk of the validity of such tax. (Ill.) *Village of Park Ridge v. Robinson*, 276.

8. MUNICIPAL CORPORATIONS—Liability of for Paths Voluntarily Maintained.—If a city constructs and maintains a bicycle path, which it permits and requires persons to use, the same rules apply, as to method and care in the construction and maintenance, as where there is a duty imposed by law, to wit, that the path must be safe for the ordinary use for which it was intended. (Wash.) *Prather v. City of Spokane*, 923.

9. MUNICIPAL CORPORATIONS—Liability of for Injuries Due to Errors in the Construction of a Path.—If a bicycle path is located and constructed with a sharp turn, because of which it is unsafe for the ordinary travel for which it was intended, the municipality cannot escape liability on the ground that the locating of the path was a governmental duty for which no action can be sustained. (Wash.) *Prather v. City of Spokane*, 923.

10. MUNICIPAL CORPORATIONS—Liability of for Defects in a Bicycle Path Where Other Parts of the Street Were Safe.—If a municipal corporation constructs and maintains a bicycle path along one side of a public street, and invites and requires all persons who travel such street on bicycles to use such path, the municipality cannot escape liability to a person injured by a defect in the street on the ground that other paths in the street were safe for bicycles. (Wash.) *Prather v. City of Spokane*, 923.

11. MUNICIPAL CORPORATIONS—Bicycle Paths, Dangerous Because of Outside Obstructions.—If a bicycle path is maintained by a municipal corporation in a dangerous condition, in this, that because of a sharp turn, a rider may run into and be injured by an obstruction situate outside of the path, the corporation is not rendered less liable for injuries received by the fact that they are not received upon, but outside of, such path. (Wash.) *Prather v. City of Spokane*, 923.

12. MUNICIPAL CORPORATIONS—Notice to—What Sufficient. If an owner of premises applies to an assistant building inspector of a city for permission to place a steam boiler beneath the sidewalk, and is told the place where it is to be put, and given instructions as

to the manner of placing it, the jury is justified in finding that the city, in the exercise of ordinary care, should have known where the boiler was placed, and the purpose for which it was so placed. (Wash.) *Beall v. City of Seattle*, 892.

13. A MUNICIPAL CORPORATION is Answerable to a Traveler Injured on One of Its Public Streets, under its control, by the explosion of a steam boiler beneath the sidewalk over which he was walking, there erected and operated for three months, under conditions in violation of one of its ordinances. (Wash.) *Beall v. City of Seattle*, 892.

14. NEGLIGENCE—When Inferable from an Accident.—If a traveler upon the public streets of a city is injured by an unseen instrument exploding within the area of a street over which a city has control, a *prima facie* cause of action is established, and it devolves upon the city to show that it exercised reasonable care in order to overcome the presumption of negligence arising from the explosion. (Wash.) *Beall v. City of Seattle*, 892.

MURDER.

See Homicide.

NEGLIGENCE.

1. NEGLIGENCE—Proximate Cause.—A person guilty of negligence is liable for all the consequences which a prudent and experienced man, fully acquainted with all of the existing circumstances, would, at the time of the negligent act, have thought reasonably possible to follow if they had occurred to his mind. Hence, if the wrong committed and the alleged damage are known by common experience to be naturally and usually in sequence, the wrong is the proximate cause of the damage. (Ala.) *Kansas City etc. R. R. Co. v. Foster*, 25.

2. NEGLIGENCE.—Presumption of applies when the case is submitted to the jury, and it is not true that the presumption of negligence existing when a passenger is injured by an accident on the railway on which he is riding applies only when the question arises on the sufficiency of the evidence to sustain the verdict or on motion for a nonsuit. The rule is equally applicable when the case is submitted to the jury. (Cal.) *Osgood v. Los Angeles etc. Co.*, 171.

3. NEGLIGENCE—Circumstantial Evidence of.—Though the evidence does not show directly and positively that an accident resulting in personal injury and death was due to a rope with a knot on it, and to the fouling of this knot with certain appliances, yet if this result may be reasonably inferred, and if the use of the rope with such knot was, under the circumstances, negligent, the court is warranted in submitting the case to the jury, and the jury in returning a verdict affirming the negligence. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

4. TRESPASSERS—Duty of Owner of Premises to.—There is no duty imposed on the owner of premises to keep them in a suitable condition for those who come there for their own convenience merely, without the invitation of the owner. (Mich.) *Ryan v. Towar*, 481.

5. CHILDREN Trespassers Injured by Dangerous Machinery are not entitled to recover therefor, though it was naturally calculated to attract them to the premises. The "Turntable cases" disapproved. (Mich.) *Ryan v. Towar*, 481.

6. CHILDREN TRESPASSERS.—Persons Going to the Rescue or Assistance of a Child and injured by dangerous machinery left unguarded cannot recover of the land owner on whose premises it is, and who has not licensed or invited anyone to enter thereon. (Mich.) *Ryan v. Towar*, 481.

7. LETTOR OF CHATTELS—Liability to Third Parties.—One who lets property for use, like one who sells it, is not responsible to third parties injured by reason of a defect in the property let or sold. (Mich.) *Griffin v. Jackson Light etc. Co.*, 496.

8. LETTOR of Dangerous Articles or Substances—Liability for Injuries to Third Persons by.—If one is under any circumstances answerable to third persons injured by a dangerous article or substance let by him to another, it can only be when there is no intervening human agency which might have prevented the injury. (Mich.) *Griffin v. Jackson Light etc. Co.*, 496.

9. A LETTOR of Electrical Appliances is not Liable to a third person injured on the premises where such appliances are used by coming into contact with a wire charged with electricity, if the lettor to whom such appliances were furnished knew of the condition of the wire, and of the necessity for taking precautions to avoid harm to persons who might come into contact with it. (Mich.) *Griffin v. Jackson Light etc. Co.*, 496.

See Death; Master and Servant; Municipal Corporations; Street Railways; Telegraphs and Telephones.

Negligence, in the construction of buildings, liability of landlords to third persons injured by, 516, 518.

of tenants, liability of landlords for, 542.

Negotiable Instruments, forged, jurisdiction of equity to cancel, 273-275.

See Bills and Notes.

NEW TRIAL.

APPELLATE PRACTICE—New Trials.—The supreme court may grant a new trial in a criminal cause where there is no evidence to support the verdict. (S. C.) *State v. Shaw*, 817.

Nuisance, created by lessees, liability of landlord to third persons for, 524.

created during the existence of a lease, liability of landlord for after granting renewal, 530.

liability of landlords for continuance of after the execution of a lease, 526.

liability of landlords for where it must be created by the ordinary use of the leased premises, 527.

See Lessors of Personal Property; Municipal Corporations, 3-5.

Personal Property, liability of lessors of to third persons, 547-558.

NURSERYMEN.

See Sales.

OFFICERS.

1. PAYMENT OF FEES by a Municipality to an Officer—What Amounts to.—If a de facto tax collector, before paying over his

collections to the municipality deducts his fees or commissions, they must be regarded as having been paid to him by the municipality. (Conn.) *Coughlin v. McElroy*, 224.

2. **DEMAND FOR FEES**—When not Void Because for Too Much. If a tax collector makes demand on a municipal corporation for his fees for an entire year, when he is entitled to fees for that part of the year only since he has taken possession of the office, his demand is notwithstanding good for the portion to which he is entitled. (Conn.) *Coughlin v. McElroy*, 224.

3. **OFFICER DE FACTO**—Payment to—Whether Relieves Municipality from Liability to Officer de Jure.—If a municipal corporation pays to a de facto tax collector his fees or commissions on collections made by him, it is thereby protected from liability to one subsequently adjudged to have been tax collector de jure. (Conn.) *Coughlin v. McElroy*, 224.

4. **AN OFFICER DE JURE** is Entitled to Recover of an Officer de Facto fees paid to the latter while in possession of the office to which it has been adjudged his title was not good. (Conn.) *Coughlin v. McElroy*, 224.

5. **PUBLIC OFFICE**—Term of.—The period between the election of a successor, and the time he actually qualifies, is as much a part of the prior term as the preceding period, and this, too, where a party is elected his own successor. (Mich.) *Grand Haven v. United States Fidelity etc. Co.*, 446.

6. **PUBLIC OFFICERS**—Money in Possession of—Title to, in Whom Vested.—The title to moneys coming into the hands of a county officer does not vest in him; they remain public moneys. (Mich.) *Board of Supervisors of Kent Co. v. Verkerke*, 450.

7. **PUBLIC OFFICERS**—Liability of to Account for Interest Received on Public Moneys.—If a county treasurer deposits public moneys with a bank, and receives interest thereon, he must account therefor to the county, though the deposit was not authorized by law. (Mich.) *Board of Supervisors of Kent Co. v. Verkerke*, 450.

8, 9. **AN OFFICIAL BOND** Containing the Signatures of the Principal and Sureties in a Justification, and Nowhere Else, properly delivered and accepted, is valid and enforceable. (Wash.) *Town of Tumwater v. Hardt*, 901.

10. **PUBLIC OFFICERS**—Liability on Official Bond.—A clerk of court is a public officer, and, as such, his sureties are liable for money received by him in his official capacity as an insurer, and not merely for the exercise of good faith. (N. C.) *Smith v. Patton*, 783.

11. **OFFICIAL BONDS**—Liability on.—If a public officer receives money in his official capacity, whether authorized or required to receive it or not, his sureties on his official bond are responsible for the safekeeping of the fund so paid in. (N. C.) *Smith v. Patton*, 783.

12. **OFFICIAL BONDS**—When Continue after the Expiration of a Term.—If a law provides that an officer shall hold for a designated time and until his successor is elected and qualifies, the sureties on his official bond remain liable until his successor qualifies. (Mich.) *Grand Haven v. United States Fidelity etc. Co.*, 446.

13. **OFFICIAL BONDS**—Sureties on—When Become Liable.—The sureties on an official bond are liable only for moneys received by their principal after its approval. Antedating, it does not make it binding for a period preceding its delivery, if its language is not retrospective. (Mich.) *Grand Haven v. United States Fidelity etc. Co.*, 446.

See Elections; Judges.

PARENT AND CHILD.

1. PARENT AND CHILD—Custody of Child.—A father's right to the custody of his child may be forfeited by misconduct, or lost by misfortune; and if he asserts his right to such custody by habeas corpus, the court may exercise a discretion for the present and future welfare and interest of the child, and leave it in the custody of its mother, or some other person, in preference to its father. (Ala.) *Neville v. Reed*, 35.

2. PARENT AND CHILD—Custody of Child.—In a proceeding by a father to obtain the custody of his child, the character, calling and condition of the father will be considered, to ascertain whether he is suitable or unsuitable, or able or unable, to properly care for the child, and in determining such question the court may properly consult the child, having sufficient judgment, whether it prefers, for any good reason, to return to him or not. (Ala.) *Neville v. Reed*, 35.

PARTITION.

See Dower.

PARTNERSHIP.

1. PARTNERSHIP.—The Usual Test of partnership as between the parties in a joint adventure is the intent to become partners. (Miss.) *Fewell v. American Surety Co.*, 625.

2. A PARTNERSHIP is not Created Between Several Creditors of a Contractor by a written agreement looking to the carrying out of a contract for their benefit. (Miss.) *Fewell v. American Surety Co.*, 625.

See Garnishment.

PASSENGERS.

See Carriers; Street Railways.

PLEDGE.

See Exchanges; Executors and Administrators, 6.

POSSESSION.

POSSESSION, CONSTRUCTIVE.—Where one is in actual possession of part of the lands described in a deed, he will be deemed in legal possession of all. (Miss.) *Seals v. Williams*, 601.

POWERS OF SALE.

See Mortgages.

Prescription, title to right of way granted by the United States to a railway corporation cannot be acquired by, 845, 849.

See Adverse Possession.

PRINCIPAL AND AGENT.

1. PRINCIPAL—Right of to Recover Moneys Paid by Agent on an Unlawful Contract.—Under the provisions of the constitution of Cali-

fornia, declaring all sales of shares of the capital stock of corporations on margins to be delivered at a future day to be void, and that any money paid on such contracts may be recovered by the party paying it, a principal may recover moneys so paid for him by an agent. (Cal.) *Parker v. Otis*, 56.

2. PRINCIPAL AND AGENT—Moneys Received on Unlawful Contracts with an Agent, by Persons not Knowing Him to be Acting for Another.—Where a principal seeks to recover moneys paid on an unlawful contract for the sale of stock on margins to be delivered in the future, it is not material that the brokers who received the money and resisted recovery did not know that the person with whom they contracted and from whom they received the money was acting as agent for the plaintiff. (Cal.) *Parker v. Otis*, 56.

See Evidence, 9-12.

PRINCIPAL AND SURETY.

1. SURETYSHIP—Separate Indemnity.—A person who is about to become a surety with others may stipulate with the principal, without the knowledge of other sureties, for a separate indemnity for his benefit alone. (N. C.) *McDowell County Commrs. v. Nichols*, 785.

2. SURETYSHIP—Separate Indemnity—Contribution.—If one surety, subsequently to becoming such, obtains from the principal a separate indemnity or counter-security, it inures to the benefit of all. (N. C.) *McDowell Co. v. Nichols*, 785.

3. SURETYSHIP—Contribution—Sufficiency of Bill.—A bill by one surety on a tax collector's bond against a surety on another of such bonds for contribution, alleging that the bond upon which defendant was surety, was executed on April 10, 1897, and that such tax collector, "on the first day of July, 1897, defaulted in failing to pay over to the county" a designated sum, is not subject to demurrer upon the ground that it fails to allege that such tax collector converted such money subsequently to the date of the execution of defendant's bond. (Ala.) *Carter v. Fidelity & Deposit Co.*, 41.

4. SURETYSHIP—Contribution—Costs of Suit.—A surety upon an official bond, who has paid the judgment and costs recovered against him, is entitled to contribution from his cosurety, not only for the amount of their principal's default, but also for the amount of the costs of the suit in which such default was established, if such costs were not frivolously nor needlessly expended in defending the suit. (Ala.) *Carter v. Fidelity & Deposit Co.*, 41.

See Officers, 8-13.

PRIVATE WAY.

See Easement.

PROBATE PROCEEDINGS.

See Executors and Administrators; Willa.

PROCESS.

See Appeal and Error.

PUBLIC LANDS.

HOMESTEADS—Lease of Interest in Before Final Proof of Entry.—A lease of the timber interest in a homestead executed before final proof is made of the homestead entry of the land is absolutely void. (Ala.) *Millikin & Co. v. Carmichael*, 45.

PUBLIC OFFICERS.

See Officers.

RAILROADS.

1. **A RAILWAY Placing Its Tracks on Lands of Another, but having good reason to think it had acquired a right of way, though responsible as a trespasser, is not liable to punitive damages, nor does the right to the material of which the road is constructed vest in the owner of the land.** (Miss.) *Illinois Cent. R. R. Co. v. Hoskins*, 612.

2. **EJECTMENT Against a Railway to Recover Land on Which Its Track was Placed, Without First Acquiring a Right of Way, may be maintained by the land owner, who may also recover for the use and occupation of the land, and all damages done in constructing the roadbed for the track, but his compensation cannot be increased by reason of the use of the track as part of its system of railways. This rule applies to a part of a short spur line as well as to the main line.** (Miss.) *Illinois Cent. R. R. Co. v. Hoskins*, 612.

See Carriers; Eminent Domain; Fixtures, 8; Street Railways. Railways, prescription does not apply to lands granted by the United States as a right of way for railways, 845, 847.

RECEIVERS.

1. **RECEIVERS—Payment of Claims of—When Authorized.**—All claims against a company which is in the hands of a receiver must be submitted to the court in which the receivership proceedings are pending for its approval before any payment of them from the defendant's assets can be ordered. (Conn.) *Barber v. International Co.*, 246.

2. **RECEIVERSHIP—Applications for Payment of Claim—When may be Heard.**—The state of the case at which all or any of the claims shall be submitted is to be determined by the court, and when the receiver himself holds a large claim against the estate, the court may hear a motion for its approval before any assets can be collected applicable to its payment. (Conn.) *Barber v. International Co.*, 246.

3. **A RECEIVER Should not be Authorized to Employ Counsel in a Suit in Which He may be the Plaintiff, and the corporation of which he is receiver defendant, for the defense dictated by the plaintiff in the cause is no defense.** (Conn.) *Barber v. International Co.*, 246.

4. **APPELLATE PROCEDURE—Orders Made After the Appointment of a Receiver.**—A judgment appointing a receiver never terminates a cause. It remains the duty of the court to make whatever orders may be necessary from time to time to settle the rights of all the parties claiming an interest in the estate, and any such order, if final in its nature as to the particular parties and matters

affected by it, may be the subject of a separate appeal. (Conn.) *Barber v. International Co.*, 246.

See Bankruptcy, 2.

REDEMPTION.

See Judicial Sales; Mortgages.

Release of one of several joint tort-feasors, 873-878.

REMAINDERS.

REVERSIONERS and Life Tenants.—The fact that a life tenant should have protected the inheritance from injury, and might have sued for injury done, cannot impair the rights of action of the reversioners. (Miss.) *Learned v. Ogden*, 621.

See Curtesy; Infants, 2.

RES GESTAE.

See Evidence, 12, 13.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgments, 10, 11.

RESTRAINT OF TRADE.

See Contracts.

RESULTING TRUST.

See Husband and Wife.

REVERSIONS.

See Remainders.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SALES.

1. **SALE**—When Does not Vest Title.—A written order to sell two certain lots of lumber at one price for the merchantable and another for the mill culls, shipment of one to be made by July 25th, and the other by August 20th, and the lumber to be inspected by a person named, which offer was accepted in writing, and afterward an agent of the purchaser made a count of the piles of lumber and checked it off on a memorandum, no one being placed in charge, nor the dock owner notified of the change in ownership, nor any change being made in the insurance, and it being understood that when

shipped the lumber was to be put over the rail of the vessel by the seller, does not vest title in the purchaser, there being no payment made except for one shipment which was taken, and no means of knowing how much of the lumber there was, nor how much of each quality until the inspection was made. (Mich.) *H. M. Tyler Lumber Co. v. Charlton*, 452.

2. NURSERYMAN—Liability of for Furnishing Inferior Trees.—If a nurseryman sells trees which he represents will bear a large, white, bright peach, good sellers, he is liable, though he furnishes trees of the species named, but which bear inferior and worthless peaches. (Mich.) *Long v. Pruyn*, 443.

3. NURSERYMAN—Liability for Furnishing an Inferior Variety of Trees.—Under a contract to sell, which permits the vendor, if he has not the trees ordered, to substitute others of equally good variety, he is liable if he substitutes trees of an inferior variety. (Mich.) *Long v. Pruyn*, 443.

4. THE MEASURE OF DAMAGES to which a Nurseryman is Liable where he sells trees of one variety, and delivers another, is the value which would have been added to the premises of the purchaser if the trees had been of the variety ordered. (Mich.) *Long v. Pruyn*, 443.

5. DAMAGES for not Furnishing Fruit Trees as Sold.—If it appears that had trees been furnished of the varieties sold they, or some of them, would probably have been killed by the cold weather, an instruction to the jury that this may be considered as bearing upon the value which the trees would have been to the premises if furnished as ordered is sufficiently favorable to the defendant. (Mich.) *Long v. Pruyn*, 443.

See Estoppel.

SETOFF AND COUNTERCLAIM.

1. COUNTERCLAIM—Construction of Statute Authorizing.—The general rule is that a statute authorizing a counterclaim should be liberally construed. (Wash.) *First Nat. Bank etc. v. Parker*, 828.

2. COUNTERCLAIM.—In an Action to Foreclose a Mortgage the defendant may assert as a counterclaim damages suffered by him in a previous suit by the mortgagor for the possession of the premises, in which he was placed in such possession and so remained until the final determination of that suit, if the statute authorizes a counterclaim "in an action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. (Wash.) *First Nat. Bank etc. v. Parker*, 828.

STATES.

1. STATES.—Concurrent Jurisdiction on the Ohio River, as granted by the eleventh section of the "Compact" between Kentucky and Virginia, means only that states thereafter formed shall have concurrent legislative jurisdiction for the purpose of navigation, and it does not confer jurisdiction for the service of civil process. Hence, the concurrent jurisdiction of Kentucky and Indiana over the Ohio river is legislative only, and the courts of Indiana have no civil jurisdiction beyond the territorial limits of that state, which extend only to low-water mark on the Indiana shore of such river. (Ky.) *Meyler v. Wedding*, 347.

2. **STATES—Jurisdiction of—Boundaries.**—The jurisdiction of the state of Kentucky extends to low-water mark of the Ohio river on the Indiana side, and a judgment of an Indiana court rendered upon service of process on the Ohio river on the Kentucky side of low-water mark is void in Kentucky, though the Indiana courts claim concurrent jurisdiction with those of Kentucky over the Ohio river forming the boundary between them. (Ky.) *Meyley v. Wedding*, 347.

STATUTES.

1. **STATUTES—Title of—When not Sufficiently Expressed.**—A statute entitled "An act to amend section 5645 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency," does not comply with the section of the constitution providing that no bill shall embrace more than one subject, and that shall be expressed in the title, and is therefore void. (Wash.) *State v. Superior Court*, 831.

2. **STATUTES.—The Title of an Amendatory Act Must Contain** some words which indicate the theme or provision of which the act sought to be amended treats. (Wash.) *State v. Superior Court*, 831.

3. **STATUTES—Substituting One for Another.**—The section of the constitution of Michigan providing that no bill shall be introduced in the legislature after the expiration of the first fifty days of the session, does not prevent the substituting of one bill for another after that period, if the subject matter of the substituted bill is germane to the original purpose indicated by the title of the original bill. (Mich.) *Common Council of Detroit v. Schmid*, 468.

4. **STATUTES—The Title of an Amendatory Act Need not be More Specific** than the title amended, if there is nothing in the former which might not have been incorporated in the latter under its existing title. Whatever might have been incorporated in the original act under its title may be added by way of amendment under the most general title. (Mich.) *Common Council of Detroit v. Schmid*, 468.

5. **STATUTES—Title of—Changing After the Introduction of a Bill.**—If the object of an act is fairly expressed in the title, the form of the title at its introduction or during any stage of legislation before it becomes a law is immaterial. (Mich.) *Common Council of Detroit v. Schmid*, 468.

See Evidence, 2.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STOCK EXCHANGE.

See Exchanges.

STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

1. **STREET RAILWAYS**—Care to be Exercised by.—A carrier of passengers is required to exercise the highest degree of care in their transportation, and this rule is applicable to street railways. (Cal.) *Osgood v. Los Angeles etc. Co.*, 171.

2. **NEGLIGENCE**—Presumption of When Passenger is Injured by Collision Between two Railroads.—Where, through a collision between two street railway cars operated by different companies, a passenger is injured, it will be presumed, in an action brought by him to recover for such injury, that it was due to the negligence of the corporation whose passenger he was. (Cal.) *Osgood v. Los Angeles etc. Co.*, 171.

3. **CHILDREN**—Right to Lecture and Frighten for Misconduct. Where boys in the streets of a city have been stealing rides by hanging on the rear end of a gravel train, an employé in charge thereof is, after vainly trying to make them desist by warning and threats, justified in catching hold of and lecturing one of them and frightening him by threats of arrest if he did not desist. (La.) *Palmisano v. New Orleans City R. R. Co.*, 381.

4. **CHILDREN**—Injury Caused by Frightening—Liability for, Where does not Exist.—If an employé, for the purpose of causing boys to desist from hanging on the rear of a gravel train and stealing rides, catches one of them, threatens him with arrest, and tells him to go and tell his playmates that the first one caught on the car will be locked up, and the boy, on being released, runs away in a direction opposite that in which it was suggested he should go, and runs into and is injured by another train, his failure to see it probably being caused by his fright, no recovery for his injuries can be had against the employer. (La.) *Palmisano v. New Orleans etc. R. R. Co.*, 381.

STREETS.

See Municipal Corporations.

SUFFRAGE.

See Elections.

SUICIDE.

See Criminal Law, 1; Insurance, 11.

SURETYSHIP.

See Principal and Surety.

SURVIVORSHIP.

See Abatement; Death.

SWEAT-BOX.

See Criminal Law, 4.

TAXATION.

TAX TITLE—Purchase of Lands Belonging Partly to the Purchaser.—If a tract of land, consisting of several subdivisions, is owned

in severalty by two persons, but assessed to unknown owners, and a single tract is sold in solido at a tax sale to one of them, such sale is void. (Miss.) *Howell v. Shannon*, 609.

TELEGRAPHS AND TELEPHONES.

1. **TELEGRAPH COMPANIES—Void Stipulations.**—A stipulation in a contract between a telegraph company and the sender of a message that the company will not be liable for damages in any case if the claim is not presented in writing within sixty days after the message is filed with the company for transmission is against public policy and void. (Ky.) *Davis v. Western Union Tel. Co.*, 371.

2. **TELEGRAPH COMPANIES—Notice of Nature of Message.**—As to the sendee of a message, the telegraph company is charged with notice of the necessity for prompt delivery if the message announces a death and the time of the funeral. (Ky.) *Davis v. Western Union Tel. Co.*, 371.

3. **TELEGRAPH COMPANIES—Night Messages.**—The receiver of a night message cannot recover from the telegraph company for delay in its delivery, if it was delivered within a reasonable time on the morning following its receipt, strictly in accordance with the terms and conditions assented to by the sender. (Ky.) *Western Union Tel. Co. v. Van Cleave*, 366.

4. **TELEGRAPH COMPANIES—Night Messages.**—Telegraph companies may establish reasonable hours within which their business may be transacted, and they may fix such hours with reference to the quantity of business done. They are not required to employ both a day and night messenger, if it is apparent that the business of the office will not justify such employment. (Ky.) *Western Union Tel. Co. v. Van Cleave*, 366.

5. **TELEGRAPH COMPANIES.**—Mental Anguish, caused by the negligent delay of a telegraph company in delivering a message announcing the time of the funeral of a brother of the sendee of the message, may be recovered for as an independent element of damage. (Ky.) *Western Union Tel. Co. v. Van Cleave*, 366.

Telegraph Corporations, damages for mental anguish, when recoverable against, 369, 370.

night, delivery of messages at, when not required, 369.

TITLE OF STATUTE.

See Statutes.

TORTS.

1. **JOINT TORT-FEASORS are Equally Liable for the Whole Injury Done**, and the injured person may pursue one separately, or all jointly, or any number jointly less than the whole, but there can be but one satisfaction. (Wash.) *Abb v. Northern Pac. Ry. Co.*, 864.

2. **THE RELEASE of One Joint Tort-feasor granted on a payment made by him necessarily releases all**, though it stipulates to the contrary. (Wash.) *Abb v. Northern Pac. Ry. Co.*, 864.

See Abatement and Revivor; Actions; Assault and Battery; Death; Husband and Wife, 7.

- Torts, husband's liability for when committed by his wife, 164-170.**
 joint tort-feasors, agreement not to sue one of several, 876, 877.
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 joint tort-feasors, dismissal of action, when does not affect actions against the others, 883.
 joint tort-feasors, joint and several liability of, 873.
 joint tort-feasors, judgment against one, issuing execution upon, when releases the others, 887, 888.
 joint tort-feasors, judgment against one remaining unsatisfied, effect of as a release, 886.
 joint tort-feasors, judgment against one with partial satisfaction, 885, 886.
 joint tort-feasors, judgment against one with satisfaction, when releases all, 885.
 judgment against several, satisfaction of one satisfies all except as to the accused, 886.
 joint tort-feasors, release of one by his marrying the person injured, 880.
 joint tort-feasors, plea in abatement that action is pending against another, 883.
 joint tort-feasors, release of one cannot reserve the right to pursue the others, 882.
 joint tort-feasors, release of one generally releases all, 873.
 joint tort-feasors, release of one not guilty of the wrong, 881.
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 joint tort-feasors, release of one of several liquor dealers, 878, 879.
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 joint tort-feasors, release of one, parol evidence to explain, 877.
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 joint tort-feasors, satisfaction received from one, partial or conditional, 874, 875.
 joint tort-feasors, satisfaction received from one releases all, 874.
 joint tort-feasors, where the claim is unliquidated, 875, 876.

TRESPASSERS.

See License; Negligence, 4-6.

TRIAL.

1. PRACTICE—Objection to Evidence—When not Waived.—If testimony is objected to on the ground that it is immaterial and incompetent, and because the writing called for by the question is not produced, and the objection is overruled, it is not waived because the adverse party then produces the writing and reads it in evidence, without the objection being then renewed. (Miss.) *Herrin v. Daly*, 605.

2. TRIAL—Waiver of Exceptions.—Exception to the action of the court in appointing a trustee for a deceased beneficiary to insurance in an interpleader case, instead of an administrator ad litem, if not taken at the term at which such appointment is made, is waived. (Mo.) *United States Casualty Co. v. Kacer*, 641.

3. JURY TRIAL—Construing Instructions as a Whole.—If an instruction does not fully or correctly state the law, the losing party is not entitled to a reversal, or to a new trial, if it was given in connection with other instructions; and, construing the whole, there is no doubt that the jury was correctly and fully instructed. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

4. JURY TRIAL.—An Instruction Must Always be Construed in the light of the evidence in the particular case, and, if applicable to the evidence in that case, it will not be held erroneous, though conditions may be conceived where it would not be a correct statement of the law. (Wash.) *Sroufe v. Moran Bros. Co.*, 847.

5. TRIAL—Evidence.—A request for a direction to the jury to return a verdict for the defendant in a civil case, if there be an element of uncertainty in the evidence which it cannot solve, is erroneous, and properly refused. (Ala.) *Jesse French Piano etc. Co. v. Porter*, 31.

6. TRIAL—Instructions.—The mere failure of the trial judge to mark "given" on a charge requested by plaintiff and given by the court, is not reversible error, in the absence of exception taken at the time. (Ala.) *Bessemer Sav. Bank v. Anderson*, 38.

7. JURY TRIAL.—Where Inconsistent Instructions are Given to a jury, it will be presumed that those last given were accepted by them as controlling (Conn.) *State v. Yanz*, 205.

8. JURY TRIAL.—A Court Does not Invade the Province of the Jury when, on a suggestion as to the admission that certain witnesses would testify to certain facts, it states that such admission tends to support plaintiff's theory rather than defendants', if such be the result, as a matter of law. (Cal.) *Parker v. Otis*, 56.

9. JURY TRIAL.—An Error of the Court in Reading to the Jury the Whole of a Section of the Constitution, on which plaintiff relies for a recovery, when part only related to the question to be decided, does not entitle the defendant to a reversal. (Cal.) *Parker v. Otis*, 56.

10. CRIMINAL TRIALS.—A District Attorney Should not Throw the Weight of His Personal Influence into a case which he is conducting by announcing his individual opinion that the accused deserved hanging. (La.) *State v. Blackman*, 377.

11. CRIMINAL TRIALS—Improper Remark from the District Attorney.—On a trial for murder, where the jury has a discretion to find in their verdict the punishment to be inflicted, it is improper for the district attorney to say to the jury, "if there is a man on that jury that does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on the jury," and if an objection is made and an exception reserved to this line of argument, and it is not retracted, a judgment of conviction awarding the death penalty should be reversed. (La.) *State v. Blackman*, 377.

12. TRIAL—Improper Remarks of Counsel.—It is reversible error to permit the prosecuting attorney, in arguing a case to the jury, to state facts which do not appear in the record, and to accuse the defendant of offenses for which he is not being tried, evidence of which would not be admissible on the trial. (Ky.) *Rhodes v. Commonwealth*, 360.

13. TRIAL—Improper Argument of Counsel.—On a trial under an indictment for maintaining a bawdy-house, it is reversible

ble error to permit the prosecuting attorney to state in his argument to the jury that "the business of the defendant, in this town is to rent and furnish bawdy-houses, and he makes his living by public bawdry and public shame; he is an old offender; he knows the law; he has been to the penitentiary, and you should not believe him under oath." (Ky.) *Rhodes v. Commonwealth*, 360.

See Appeal and Error; Criminal Law; Jury.

TRUSTS.

1. **TRUST FUNDS** do not, on the Death of the Trustee by Whom They Were Held, become liable for the debts of his estate, nor is the relation of the cestui que trust thereto changed. (Wash.) In re *Belt's Estate*, 916.

2. **EQUITY JURISDICTION**.—Courts of equity have power to appoint a trustee whenever it is necessary to protect, assert, or defend a right to property that is properly in the custody of such court. (Mo.) *United States Casualty Co. v. Kacer*, 641.

See Executors and Administrators, 3, 4; Husband and Wife.

Trust Deeds, powers of sale in, death of grantor does not suspend or destroy, 576.

powers of sale in, discretion of the trustee to subdivide or to sell en masse, 585, 586.

powers of sale in, duties of the persons exercising the power, 585.

powers of sale in, for the payment of debts, are valid, 574.

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UNDUE INFLUENCE.

See Wills.

VENDOR AND VENDEE.

1. **VENDOR AND VENDEE**—Construction of an Agreement to Sell and Convey.—The fact that a purchaser of real property was engaged in the business of hop-raising, and purchased certain real property for the purpose of curing and marketing his product, on which was a hop-house and kiln belonging to a tenant, cannot vary the agreement to sell so as to include therein a hop-press situate in one of the rooms of such house. (Wash.) *Sherrick v. Cotter*, 821.

2. **VENDOR AND VENDEE**—Rescission of Contract.—A vendee in undisturbed possession of land is not entitled to a rescission of his contract of sale, if the vendor is able and willing to convey a good title, unless time is of the essence of the contract. (Ky.) *Holmes v. Holmes*, 342.

3. **VENDOR AND VENDEE**—Purchase from Married Woman—Rescission.—A vendee in possession under a deed from a married woman, though such deed is void, is not entitled to rescission if he is tendered a good and valid deed before the purchase money is fully paid. (Ky.) *Holmes v. Holmes*, 342.

VESTED RIGHTS.

See Constitutional Law.

VICE-PRINCIPAL.

See Master and Servant.

WAGES.

See Exemptions.

WAREHOUSEMEN.

See Bailments.

WASTE.

1. **WASTE.**—A Cutting Down of Trees by a Life Tenant for Mere Profit is waste. (Miss.) Learned v. Ogden, 621.

2. **WASTE.**—A Tenant by the Curtesy by cutting down trees for sale, commits waste. (Miss.) Learned v. Ogden, 621.

3. **WASTE.**—Actions by Reversioners for.—The felling of trees by a tenant for life, or years, for the purpose of selling them, is an injury to the inheritance, for which the reversioners have their appropriate action. (Miss.) Learned v. Ogden, 621.

4. **WASTE** — Extent of Reversioner's Right to Recover for.—Trees when felled or separated from the soil, and cut for profit, become personal property, in which the tenant in possession has no interest, and the reversioner may maintain his action for the possession of the property, or for damages in the same manner, and with like effect as if he were the owner of the estate in possession. (Miss.) Learned v. Ogden, 621.

5. **EVIDENCE** — When Insufficient.—To Sustain a Recovery by the Plaintiff in an Action for Waste, the evidence should show, with reasonable certainty, what trees were severed by the defendant or his servants, or that injury was done by him or them to the plaintiff's inheritance during the period for which the bar of the statute of limitations does not apply. (Miss.) Learned v. Ogden, 621.

6. **EVIDENCE.** — Sawmill Books of the defendant furnish no evidence to determine his liability in an action of waste for cutting timber. (Miss.) Learned v. Ogden, 621.

WATERS AND WATERCOURSES.

1. **RIPARIAN OWNERS**—Right of to Cut Trees, Though the Water in a Stream is Thereby Lessened.—The cutting of trees by a riparian owner on his own land is a legal act, and cannot be enjoined because it lets in the sun, causes greater evaporation, and thereby lessens the amount of water which would otherwise flow upon the lands of the lower proprietor. (Cal.) Fisher v. Feige, 77.

2. **A RIPARIAN OWNER** has the Right to Build a Dam Across a Stream if he does not thereby appreciably diminish the amount of water which naturally flows to the lands of his neighbor below. (Cal.) Fisher v. Feige, 77.

3. **WATER**—Right of a Riparian Owner to Restrict the Use of by Another.—One riparian owner is not entitled to an injunction re-

striking the other to the use of so much of the waters of a stream as may be necessary for his household and domestic purposes and water for his stock. (Cal.) *Fisher v. Feige*, 77.

4. **WATER, Surface.—An Owner of Land has no Right to Rid His Land of Surface Water** by collecting it into artificial channels and discharging it upon the lands of an adjacent proprietor, to the latter's injury. (Wash.) *Noyes v. Cosselman*, 937.

5. **WATERS in a Lake, Right to Turn Upon the Lands of Another.**—An owner of lands on which a lake is situated has no right to improve such lands by cutting through a natural barrier, and thereby draining them upon the lands of adjacent proprietors, though the latter might, in turn, protect themselves by diking and ditching, or by constructing such an artificial barrier on their lands as might prevent the flow of such water thereto. (Wash.) *Noyes v. Cosselman*, 937.

WAY OF NECESSITY.

See Easements.

WILLS.

1. **WILLS — Signature of Testator — Subscribing Witnesses.**—Under a statute providing that "all wills and testaments shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses, present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator," it is essential that everything required to be done by the testator, including his signature, precede in point of time the subscription of the witnesses. (N. J. Eq.) *Lacey v. Dobbs*, 667.

2. **WILLS, CONSTRUCTION OF.—Extrinsic Evidence is not Admissible** to aid the construction of a will, where, from its language alone, when applied to the facts and circumstances to which it relates, the meaning of the testator is clear. (Conn.) *Thompson v. Betts*, 235.

3. **WILLS, CONSTRUCTION OF.—Extrinsic Evidence, When Admissible.**—For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to be interested under the will and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. (Conn.) *Thompson v. Betts*, 235.

4. **WILLS—Legacy, Repetition of.**—Where a will twice names the same legatee and the amount of the legacy, the legatee is entitled *prima facie* to but one legacy, nor does proof that the legatee was a favorite sister of the testator render this rule inapplicable. (Conn.) *Thompson v. Betts*, 235.

5. **WILLS.—The Burden of Proof** is on the executor to prove the soundness of mind, and on the contestant to prove undue influence. (Mass.) *Bacon v. Bacon*, 397.

6. **WILLS—Undue Influence.**—It is not True that Any Influence Exerted by a Legatee over the testator inducing him to make a will

is an undue influence authorizing the setting aside of the will. (Mass.) *Bacon v. Bacon*, 397.

7. **WILLS**—Influence and Defective Mental Condition.—It is not true that if an influence is brought to bear on a testator in favor of a will not sufficient to control the mind in a normal condition, but sufficient to control the mind of the testator, so that, taking such influence and the mind of the testator together, the will may be regarded as a product thereof, the will must be rejected, if it does not appear that such influence was an undue influence. (Mass.) *Bacon v. Bacon*, 397.

8. **WILLS**—Cancellation of Signature.—The finding of a will in the testator's desk with his signature canceled raises the presumption that the cancellation was done by him with the intention of revoking it. (N. Y.) *Matter of Hopkins*, 746.

9. **A DEVISE of Land Which is Subject to a Mortgage Made by the Testator** imports an intention that the debt be satisfied out of the general personal assets. (Conn.) *Bulkley v. Seymour*, 229.

10. **WILLS**.—A Legacy will be Satisfied out of Lands Specifically Devised if the will was made by the testator on his deathbed, knowing that he had no money or personal property out of which the legacy could be paid. (Miss.) *Stuart v. Robinson*, 603.

11. **LACHES**—Probate of Will.—The lapse of a third of a century between the admission of a will to probate and an application to annul the order admitting it, shows such laches on the part of the applicant as will bar him of relief. (Ala.) *Whittaker v. McKinney*, 37.

See Dower; Evidence, 5.

WITNESSES.

EVIDENCE—Conclusion of Law and Fact.—A question which embodies an improper invitation to the witness to state a conclusion involving both law and fact is properly rejected. (Ala.) *Ferguson v. State*, 17.

See Evidence.

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